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THE

LAW OF NATIONS

CONSIDERED AS

INDEPENDENT POLITICAL COMMUNITIES.



THE LAW

THE

LAW OF NATIONS

CONSIDERED AS

INDEPENDENT POLITICAL COMMUNITIES.

ON THE RIGHT AND DUTIES OF NATIONS
IN TIME OF PEACE.

BY

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PREFACE.

THE object which the Author has had in view in undertaking to treat of the Law of Nations, has been to present to the Student of that branch of Law, which is conversant with the mutual Rights and Duties of Independent Political Communities, a systematic outline of the leading Principles which are at the foundation of that Law, and at the same time to illustrate the application of those Principles, as occasion served, by reference to the Practice of Nations in the conduct of their mutual Intercourse. For the purpose of such illustration, the Peace of Westphalia has been adopted as a suitable starting point, as that Event ushered in a new Era in the intercourse of Commonwealths, the Treaties of Munster and Osnabruck being the first practical recognition on the part of the Nations of Europe of the Prin-

ciple of Territorial Sovereignty, and supplying a groundwork for an European Concert to uphold that Principle.

The Treatise of Grotius upon the Right of Peace and War, which had appeared in the early part of the Thirty Years' War, had contributed in a marked degree to pave the way for the conclusion of those Treaties, by familiarising the minds of Statesmen with the conception of Territorial Sovereignty; nor was there much difficulty in establishing the connection between the Sovereignty of Princes, as a *Paramount Right*, and the possession of Territory, for that Right was involved in the idea of the Imperial Supremacy, the whole civilised world being taken, for the purposes of that Supremacy, to be the Territory of a Common Sovereign. But the Rights incidental to Sovereignty, regarded in connection with the *Absolate Ownership* of Territory, were not so easy to demonstrate; in other words, the Rights of Independence, or, as they have been termed by certain writers on Jurisprudence, the

External Rights of Sovereignty had received no recognition, as there was no place for them, under that System. They had accordingly both to be reasoned out, and to be applied, and in this consisted the great merit of the labours of Grotius.

The proposition, that States, considered as Independent Political Communities, are all Equal in point of Right, however much they may differ in the extent of their Territorial Possessions, may be said to have been first propounded and successfully maintained by the Philosopher of Delft, and this Equality was practically recognised at the Peace of Westphalia, when the States of Central Europe for the first time grouped themselves together after the likeness of a family of Nations.

It is to be regretted at a time when much progress is being every where made in practice to establish the ascendency of the Reason over the Will, that certain eminent Writers, who have treated of General Jurisprudence, have

adopted the primeval Notion of Law, according to which, Law is exclusively to be regarded as a Rule of conduct imposed by a Sovereign Power upon a Subject Community; in other words, as the Enactment of the Will of a Superior Power. There is, according to this use of the word Law, no such thing as a Law of Nations, for Independent Political Communities from their nature, as such, do not acknowledge any common Superior. But a broader view of Law was taken by the Scholastic Jurists, who were the immediate predecessors of Grotius. Law according to them was an Ordinance of Reason promulgated for the Common Good; and if it were necessary to shew from the practice of mankind that this is not a Speculative Notion of Law, we might appeal to the foundation upon which the Ordinances (Νόμοι) of Solon as distinguished from the Enactments (Θεσμοὶ) of Draco rested: we might further call attention to the place assigned in the system of the Civil Law of Rome to the Senatus-Consulta and the Responsa Prudentum by the side of the Edicta Magistratuum and the Placita Principum. It appears,

however, to be a well founded distinction between a Rule of Law and a Rule of Morality, that whenever the sanction of a Rule of conduct is physical, in other words, whenever the Sanction is fear of injury to Person or Property, the Rule may be properly classed under the head of Law, as distinguished from Morality, the Sanctions of which are only to be discovered in the Human Conscience.

It may be asked accordingly, what are the Physical Sanctions to the Rules which regulate the Intercourse of Nations? It was one of the main objects of the system of Grotius to supply an answer to this Question. The Right of War, *purum piumque duellum* according to the *formula* of the Roman Fecials, furnishes the Principle. "War," said the great Athenian Orator in the declining days of Athens, "is the mode of proceeding against those who cannot be restrained by a Judicial Proceeding; for Judicial Proceedings are of force against those who are sensible of their inability to oppose them, but against those who are or think them-

selves of equal strength, War is the Proceeding; yet this too, in order that it may be justified, must be carried on with no less scrupulous care than a Judicial Proceeding." Such being the Principle, the Treaties of Munster and Osnabruck furnish us with the Method of applying it, for they laid the foundation of a Balance of Power amongst the Greater States, which it has ever since been the object of an European Concert to maintain.

The Treaties of Utrecht in the early part of the last century were a solemn affirmation of the Right of Coalition against any Power that should seek to disturb the European Equilibrium, and the Records of the last Congress of Paris bear evidence that the Spirit, which dictated those Treaties, is still the governing Spirit of the European family of Nations.

According, then, to the distinction above suggested, the Rules of Conduct which govern the Intercourse of Nations are not improperly

considered to form a body of Law strictly speaking, as they have Physical Sanctions of no ordinary character in the consequences of War. The Ruins of Sebastopol bear convincing testimony that this is not a fiction of Jurists, but a stern reality of International Life.

With regard to the arrangement of the present Work, the First Part comprises the Rights and Duties of Nations in time of Peace: the Second Part will embrace the Rights and Duties of Nations in time of War.

OXFORD,
JUNE 12, 1861.

PART I.

OF THE

RIGHTS AND DUTIES OF NATIONS IN TIME OF PEACE.

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CHAPTER I.

NATIONS AS SUBJECTS OF LAW.

Nations independent political Communities—Science of the Law of Nations—Element of Roman Law—Definition of a State adopted by Grotius—Puffendorf's Definition of a State—Christian de Wolff—Vattel's Definition of a State—Growth of Natural Society—Natural Society of Nations—Nationalisation and Denationalisation of States—Hobbes' view of political Society—Equality of Nations—Perfect and Imperfect Rights of Nations—Rights incidental to the Right of Self-preservation—Obligations corresponding to Rights—The good offices of Nations discretional—Right of Coalition.

Nations, independent political Communities.

§ 1. THE term *Nation*, in its primary and etymological sense, denotes a race of men, in other words, an aggregate body of persons, exceeding a single family, who are connected by the ties of a common lineage, and perhaps by a common language. In a secondary and political sense the term Nation signifies a society of persons occupying a common territory, and united under a common government, in other words, a Commonwealth or State. It is from this latter point of view that we regard Nations, when we speak of their mutual intercourse being governed by certain rules, which are of permanent obligation, and from the operation of which no Nation can withdraw itself, without renouncing at the same time the fellowship of other Nations. Those rules, being of universal application, admit of scientific investigation, and may be reduced to method, and the science which is conversant with those rules is the Science of the Law of Nations, in other words, International Jurisprudence.

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Science of the Law of Nations.

§ 2. The Science of the Law of Nations may be accordingly defined to be the Science of the Rules which govern the International Life of States. All States however do not enjoy International Life. Thus the States which constitute the North American Union do not exercise individually any international action, either in relation to one another or in relation to foreign States. The States which form the Helvetic Confederation are under similar conditions, as well as the Christian States of the Ottoman Empire. On the other hand, the States which compose the Germanic Confederation are both Germanic States and European Nations.

Element of Roman Law.

§ 3. We must not expect to find in the works of the earlier writers on Public Law any very complete definition of the elements, which impart to a State the character of a Nation. Amidst the total disorganisation of the European State-System consequent on the Reformation and the religious alliances of the Thirty Years' War, Grotius found no element remaining either in the Feudal or in the Ecclesiastical Body of Law, upon which he could venture to build up a system of permanent relations between Nations. He fell back accordingly upon those views of a State-System to which the early Jurisprudence of Rome had given authority, and framed his definition of a State upon the classical model which exists in Cicero's treatise on Political Law[1]. The treatise itself, in which the original definition occurs, was not indeed before the eyes of Grotius, as it was lost sight of in Western Europe towards the

Cicero de Republica.

[1] Est igitur, inquit Africanus, respublica res populi; populus autem non omnis hominum cœtus quoquo modo congregatus, sed cœtus multitudinis juris consensu et utilitatis communione sociatus. De Republica, Lib. I. c. 25.

close of the twelfth century[2], and the fragments of the Vatican Palimpsest, from which the original text has been partially restored, were only deciphered in the earlier part of the present century; but the definition of a State in the identical language of the great Roman Jurisconsult, and as falling from the lips of Scipio Africanus himself, had been embodied by St. Augustine in his "City of God[3];" and was transmitted therein to the Jurists of the 17th and 18th centuries. It has been conjectured by the learned cardinal Angelo Maii, the decipherer of the Vatican Palimpsest, that the perusal of Cicero's treatise first suggested to St. Augustine the idea of his incomparable Work. However that may be, the stamp of St. Augustine's approval, having been impressed upon the conception of the great Roman Jurisconsult, commended it with additional force to the acceptance of Grotius, who in seeking to construct for the first time a system of Public Law upon the combined basis of Natural Right and Universal Consent, was anxious to keep in sight as many as possible of the great landmarks, which the pioneers of Juridical Science had set up, and which had hitherto connected International Jurisprudence with general Morals.

S. Augustinus de Civitate Dei.

§ 4. Grotius has accordingly defined a State in these words; "Est autem civitas cœtus perfectus liberorum hominum juris[4] fruendi et communis utili-

Definition of a State adopted by Grotius.

[2] John of Salisbury in the 12th century is the last writer in Western Europe, who seems to have had access to the original text of Cicero's treatise.

[3] De Civitate Dei, L. XIX. c. 21. St. Augustine adds, "ubi ergo non est ista justitia, profecto non est cœtus hominum juris consensu et utilitatis communione sociatus."

[4] *Jus* or Right (Droit) has been defined to be The External freedom of the Moral person. Neque enim *Juris* nomine aliud significatur, quam libertas, quam

tatis causa sociatus[5]." It has been remarked by Barbeyrac in his annotation to this passage, that Grotius has followed Aristotle in defining a State to be a *complete Society*, in other words, a Society containing within itself all that is necessary for living commodiously and happily. But a more important variation from the classical model may be observed in the substitution of *liberorum hominum* for *multitudinis*, a substitution which implies the freedom of the individual man in a natural state. It is this freedom of the individual man, which forms the keystone of the arch upon which the whole system of Grotius rests. A State accordingly, in the contemplation of Grotius, is a *complete body of free men* associated together for the enjoyment of Right and for the common good.

Puffendorf's definition of a State.

§ 5. Puffendorf, on the other hand, whose object was to identify the Law of Nations with a system of Moral Right based solely on Natural Law, in opposition to the system of Grotius, has thus defined a Civil State: "It is a compound Moral Person, whose will being united and tied together by those covenants which before passed amongst the multitude, is deemed the will of all, to the end that it may use and apply the strength and riches of private persons towards maintaining the common peace and security[6]."

The classification of a State under the head of Moral Person for the purpose of assimilating its rights and duties to those of a Natural Person involves a *metaphysical* conception of the Being of a State. Puffendorf's definition will accordingly afford no as-

quisque habet, facultatibus naturalibus secundum rectam rationem utendi. Hobbes de Civ. c. 1. § 7.

5 De Jure Belli et Pacis, L. I. c. 1. § 14.

6 Law of Nature and of Nations, B. VIII. c. 14. § 13.

sistance in an inquiry in which the *real* or *constituent* elements of a State are the subject of investigation.

Christian de Wolff.

§ 6. Christian de Wolff, the master of Vattel, does not pause to define a Nation, but commences his treatise on the Law of Nations by defining its subject to be the science of the Right which Nations or peoples enjoy in relation to one another, and of the obligations corresponding to it. "Scientiam juris quo gentes sive populi inter se utuntur et obligationum eidem respondentium[7]." But, in thus defining the science which he proposes to discuss, De Wolff has indirectly indicated wherein the character of a Nation consists, when he speaks of the Right which Nations or peoples enjoy in relation to one another, and the obligations corresponding to it. It is in the capacity of a people to fulfil the obligations of Natural Society towards other peoples without the consent of any political superior, that we discover the true characteristic of International Life. No political body, which does not possess a perfect liberty of action in such matters, can be in permanent relation to other political bodies; for such permanent relation implies the mutual discharge of the duties of Natural Society, and such mutual discharge can only have permanent place between political bodies which can freely reciprocate good offices, in other words, between political bodies which are *sui juris* and not subject to any political superior.

Vattel's definition of a State.

§ 7. Vattel at the immediate outset of his work has defined Nations or States in identical terms, as "bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined

7 Jus Gentium Methodo Scientifica pertractatum. Prolegomena, § 1.

strength[8]." He then engrafts upon this real definition a metaphysical conception of the Being of a State, analogous to Puffendorf's notion. "Such a Society has its affairs and its interests; it deliberates and takes resolutions in common: thus becoming a Moral Person, which possesses an understanding and a will peculiar to itself, and is susceptible of obligations and rights." He afterwards falls back into the track of De Wolff, and defines the Law of Nations to be the Science of the Right which has place between Nations or States, and the obligations corresponding to that Right; and further, as he proceeds to examine that Right and the corresponding obligations, he characterises Nations as *Sovereign States*[9], which are to be considered as *so many free persons* living together in a State of Nature. "It is a settled point," he observes, "with writers on natural law, that all men inherit from Nature perfect liberty and independence, of which they cannot be deprived without their own consent. In a State the individual citizens do not enjoy them fully and absolutely, because they have made a partial surrender of them to the Sovereign. But the body of the Nation, the State, remains absolutely free and independent with respect to all other men and all other nations, as long as it has not voluntarily submitted to them[10]."

Growth of Natural Society.

§ 8. Man is so constituted by Nature, that he cannot supply all his own wants, but requires the intercourse and assistance of his fellow men, either for his immediate preservation, or for the perfection of his Being. The experience of communities on this head confirms what the instinct of the individual man sug-

8 Droit des Gens. Préliminaires, § 1.

9 In the sense of *territorial* sovereignty, that is, absolute dominion over a certain territory.

10 Préliminaires, § 4.

gests. There is accordingly in human nature a tendency towards society, and whenever opportunity presents itself, men are found to associate themselves together for the purpose of mutually aiding and assisting one another. There thus grow up spontaneously relations of Natural Society amongst men. The law of this Natural Society is that each individual should do for the others every thing which their welfare requires, and which he can perform without neglecting the duty which he owes to himself, and this obligation of Natural Society is co-extensive with the human race[11]. The Universal Society of the human race being thus an institution of Nature, all men are bound to cultivate it, and to discharge its duties; and they cannot release themselves from that obligation by any convention, or by any private association. When, therefore, men unite themselves in Civil Society for the purpose of forming themselves into a State, they may enter into positive engagements towards one another individually, and towards the State as a community, but they continue still to be under the obligations of Natural Society towards the rest of mankind. The mode of discharging these obligations may be influenced by the institution of Civil Society, inasmuch as the individual members of a political community having agreed in certain things to act in common, and having resigned their rights, and submitted their will to the common body in every thing which regards their welfare as a community, the duty of discharging the obligations of Natural Society towards strangers, in all matters wherein the liberty of the individual members has been restricted, devolves upon the common body; in other words, upon the State. There thus grow up

[11] Préliminaires, § 10.

spontaneously relations of *Natural Society amongst States*, the purpose of which is the interchange of good offices between political communities for their mutual preservation, and for the advancement of the happiness of one another. Political communities participate in this Natural Society, as free and independent bodies of men, under conditions analogous to those under which individual men participate in Civil Society. "As men," writes Vattel, "are subject to the laws of Nature, and as their union in Civil Society cannot have exempted them from the obligation to observe those laws, since by that union they do not cease to be men, the entire Nation, whose common will is but the result of the united wills of the citizens, remains subject to the laws of Nature, and is bound to respect them in all its proceedings[12]."

Natural Society of Nations.

§ 9. International Society is thus in its elementary condition the most enlarged phase of Natural Society, wherein men hold intercourse with one another, not individually and immediately as in Civil Society, but collectively and by representation, the Body of men, of which a political community consists, holding intercourse with other like Bodies of men through the medium of the State, the internal organisation of which is immaterial, provided it represents the Civil Society for all international purposes. It is necessary for this end, that a State should possess all the qualifications for Natural Society, which the individual members of it inherit from Nature, and should be able to perform towards other States every thing which their welfare requires, and which it can effect without neglecting the duty which it owes to its own members. A State must therefore for the purposes of International Society be free and inde-

[12] Préliminaires, § 5.

pendent of all other States, in like manner as individual men are by nature free and independent of one another. *Independence* is accordingly the fundamental element which imparts to a State the character of a Nation. A Nation is in fact a political body, capable of discharging without the consent of any political superior the obligations of Natural Society towards other political bodies; and of regulating in concert with them the mode of discharging those obligations, either as regards the mutual action of the communities themselves, or as concerns the intercourse between individual members of them.

Nationalisation of States.

§ 10. A State is admitted into the fellowship of Nations either *overtly* by the recognition of its Independence in some Public Act on the part of the Established Powers, or *tacitly* by being allowed to be a contracting party to a Public Convention entered into with the Established Powers. Thus the States of the Roman Empire of the Germans, upon the signature of the Treaty of Westphalia, became *de jure* members of the European family of Nations. Their capacity to make conventions among themselves and with non-Germanic Powers, without the political sanction of the Emperor and the Empire, had been under the VIIIth Article of that Treaty explicitly recognised by the established Powers, and so became part of the Public Law of Europe. On the other hand the Federal Union of North American States was *de facto* recognised as a Nation by France, when Louis XVIth concluded the Treaties of Paris, (Feb. 6th, 1778,) with the Envoys of the Thirteen Provinces; and by the Low Countries, when the States General concluded the Treaty of the Hague with them, (Octr. 8th, 1782); and the claim of the Union to be generally regarded as a Nation, became indisputable from

Treaty of Westphalia.

the day when the Mother Country acknowledged *de facto* her former dependencies to be *sui juris* by entering into international engagements with the Federal Union. (Treaty of Versailles, Sept. 3, 1783.)

Denationalisation of States.

On the other hand, the Denationalisation of a State ensues, upon its ceasing to have the capacity to enter into engagements freely with other Nations, whether it has voluntarily renounced its capacity, or has been deprived of it by a superior Power. Thus the Republics of the Valais and of Geneva, and the Principality of Neuchatel, voluntarily renounced their capacity to enter into treaty-engagements with foreign powers upon their admission into the Union of Helvetic States[13], and the separate Nationality of each State was thenceforth merged in the common Nationality of the Federal Union. On the other hand, the princes of the Germanic Empire who were mediatised upon the formation of the Confederation of the Rhine, (July 12, 1806[14],) were interdicted by the independent members of that Confederation, to whose sovereignty they had been made respectively subject, from entering into treaty-engagements with Foreign Powers. They accordingly ceased to occupy the place in the family of Nations, into which they had been admitted by the Treaty of Westphalia.

Confederation of the Rhine, July 12, 1806.

Hobbes' view of political society.

§ 11. Hobbes' has adopted a view of the origin of Political Society, according to which no community would be entitled to be regarded as a Nation, unless it were adequate to maintain its independence against all external assault by its own intrinsic strength[15].

[13] Martens, Nouveau Recueil de Traités, IV. p. 168.

[14] Ibid. VIII. p. 488.

[15] Necessarium itaque est ad securitatem, quam quærimus obtinendam, ut numerus eorum, qui in mutuam opem conspirant, tantus sit, ut paucorum hominum ad hostes accessio non sit ipsis conspicui momenti ad victoriam. De Cive, c. 5. § 3.

Such an idea of independence as applicable to Political Societies, however tenable it may be in abstract theory, will be found in practice to be too absolute, as there are weaker and stronger members of the family of Nations, and the weaker members owe the maintenance of their independence to the mutual fears and jealousies of the more powerful Nations, whilst on the other hand the stronger members could not maintain themselves single-handed against the combined assault of the weaker Nations. A State is entitled to be regarded as independent, if it be not *de jure* dependent upon any other State for its freedom of political action.

Equality of Nations.

§ 12. The independence of a Nation is absolute, and not subject to qualification, so that Nations in respect of their intercourse under the Common Law are Peers or Equals[16]; and their rights and obligations are under that law reciprocal. Power and weakness do not in this respect give rise to any distinction, and a Free City of Germany is as much an independent State as the Empire of the Ottomans. It results from this equality, that whatever is lawful for one Nation is equally lawful for another, and whatever is unjustifiable in the one is equally unjustifiable in the other.

Right of Self-defence.

As independence is an essential condition of Nationality, a Nation will be justified in doing or practising whatever is necessary for the maintenance of its independence. The right of self-defence is accordingly a primary right of Nations, and it may be exercised either by way of resistance to immediate assault, or by way of precaution against threatened aggression. The indefeasible right of every Nation

[16] Vattel, Préliminaires, § 18. Heffter, § 27. Klüber, § 89. Wolff, § 16.

to provide for its own defence, is classed by Vattel amongst its *perfect rights*.

Perfect and Imperfect Rights of Nations.

§ 13. The distinction which Vattel has drawn between the perfect and the imperfect rights of Nations may be conveniently noticed here. "The perfect right," says Vattel[17], "is that which is accompanied by the right of compelling those who refuse to fulfil the corresponding obligation; the imperfect right is unaccompanied by that right of compulsion. The perfect obligation is that which gives to the opposite party the right of compulsion; the imperfect only gives him the right to ask. The right is always imperfect, when the corresponding obligation depends on the judgment of the party in whose breast it exists, for if in such a case we had a right to compel him, he would no longer enjoy the liberty of determining as to the conduct which he should pursue, in order to obey the dictates of his own conscience. Our obligation is always imperfect with respect to other people, as long as we possess the liberty of judging how we are to act, and we retain that liberty on all occasions on which we ought to be free." A perfect right alone would thus seem to be the subject of Law. An imperfect right is a subject of *Comity*.

Rights incidental to the right of self-preservation.

§ 14. Accordingly, a reasonable fear of danger to its own independence, is held to justify a Nation in having recourse to war in order to prevent attack. This right of a Nation to preserve itself from injury by anticipating attack, is a perfect right. It is *the right of security*, and is incidental to the right of self-preservation. When an injury has been inflicted, the same right of self-preservation authorizes the injured Nation to obtain complete reparation, and to

Right of Security.

[17] Droit des Gens. Préliminaires, § 17.

employ force for that purpose. This may be termed *the right of indemnity.* Right of Indemnity.

The right of self-preservation necessarily involves all other incidental rights which are essential as means to give effect to the principal end[18]. Thus a Nation, after it has been attacked and has worsted its enemy, will be justified by taking precautions against a second attack, by depriving its enemy of the means of renewing his aggression. The justice of all war depends upon the principles involved in the right of security and the right of indemnity. Whatever strikes at those rights strikes at the Perfect Rights of a Nation, and is a just cause of war.

§ 15. Every right which a Nation possesses under the Common Law has its corresponding obligation. The right of security accordingly involves the obligation of self-restraint, so as to avoid encroaching on the independence of other States, and the right of indemnity involves the obligation of granting redress. A Nation is mistress of her own actions as long as they do not affect the perfect rights of other Nations. It owes as a duty to itself, in the first instance, and in preference to all other Nations, to do every thing that can promote its own happiness and perfection, but it must not overstep the limit beyond which it cannot pass without impairing the happiness and perfection of another Nation. On the other hand, when a Nation cannot contribute to the welfare of another Nation without doing an essential injury to itself, it has reached the limit of its natural obligations towards that Nation, and it is considered to be under a disability to perform any further good offices towards it. Obligations corresponding to Rights.

§ 16. Every Nation is entitled to form its own The good offices of

[18] Wheaton's Elements, pt. II. c. 1. § 1.

Nations discretional.

judgment whether it can perform towards another Nation any good office without neglecting the duty which it owes to itself[19]. Treaty-engagements however may control the exercise of a Nation's free judgment in such matters, for a Nation may voluntarily wave some portion of the liberty, which is by Nature inherent in it. In all cases, however, in which a Nation has the right of judging what its duty requires, no other Nation can compel it to act in this or that particular manner; for any attempt at such compulsion would be an encroachment on the independence of that Nation. It is otherwise where a Nation has voluntarily bound itself to perform a particular good office towards another Nation; in such a case it has exercised its independence as a Nation when it contracted the particular engagement, the strict fulfilment of which has become henceforth a matter of good faith, and not a sign of dependence.

Right of Coalition.

§ 17. Since Nations are independent communities holding intercourse with one another on terms of equality, every Nation is at liberty to regulate its own actions by its own sense of duty within the sphere of its perfect Rights. Hence a Nation is on many occasions under the obligation of allowing certain things to be done by another Nation, although it may disapprove the same, because it cannot prevent them by force without violating the independence and equality of that Nation, and so destroying the foundation of the Natural Society of Nations. The laws on which that natural society rests are of such paramount importance to the safety of all Nations, that if a more powerful State were at liberty upon its own view of justice or expediency to set them aside in regard to a weaker State, no Nation could rely with any security

19 Vattel, Préliminaires, § 16.

upon the preservation of its own existence. But every Nation has a perfect right to those things which are necessary to its preservation, and every State enters into the Society of Nations upon that understanding. All Nations have accordingly a right to combine their strength for the purpose of repressing any one or more Nations, which seek to infringe any cardinal rule of international life[20]. The exercise of that Right however must not extend beyond those limits which the interests of Natural Society mark out; it must be in its turn so regulated, as not to prejudice the independence of the Nation, which has provoked the interference of its Compeers.

[20] Vattel, Droit des Gens, L II. § 53.

CHAPTER II.

INCIDENTS AND MODIFICATIONS OF INTERNATIONAL LIFE.

Continuity of International Life—Determination of International Life—International recognition of Independence—International Life not determined by political changes within a State—Personal Treaties—Real Treaties when affected by political changes—Sovereignty distinguished from Independence—Semi-Sovereign States a Solecism—Conventional Independence of States—Independent States under Protection—The Principality of Monaco—The Lordship of Kniphausen—The United States of the Ionian Islands—Neutrality of a Protected Independent State—The Free City of Cracow—Its internal Constitution a subject of treaty—Cracow and the Ionian Islands—The extinct Republic of Poglizza—The Republic of Andorre—The Republic of San Marino.

Continuity of International Life.

§ 18. THE peculiar objects of the Law of Nations being the external relations which exist between independent political Communities, considered as entire Communities, it is immaterial for the purposes of that law, what may be the internal organisation of such Communities, further than to ascertain in what portion the Supreme Power resides; for the Supreme Power controls the entire Community, and the will of the Supreme Power is the will of the Community itself in matters of external, equally as of internal, law. The Supreme Power of a State is termed the Sovereign Power properly, in reference to the members of the State who are subject to it; but publicists have sometimes used the term Sovereign Power in a metaphorical sense, to denote the entire State or Nation, viewed from without, and the Law of Nations has accordingly been defined by them to be the law

which regards the conduct of Sovereign Powers in relation to one another; the intercourse between States or Nations being, as a matter of fact, carried on between the Sovereign portions of them[1]. Hence the person of the Sovereign, or Chief of the State, has been taken to represent the whole Community, and has become identified with it for purposes of negotiation and treaty. It is immaterial for international purposes what may be the peculiar organisation of the Sovereign Power within a State. For instance, whether the Chief of the State be an hereditary or an elective Monarch, whether his tenure of office be for life or for a term of years, whether his power within the State be exercised absolutely according to his own will or under limitations according to established rules, may be considerations of high importance to the subject members of each State, but are matters which do not concern other States or Nations. It is however of concern to other States or Nations that the international life of a State should not be interrupted by any change of internal order, as for instance, by the natural or political demise of the Chief of the State. Hence in States where the most absolute form of Monarchy has prevailed, and where the person of the Prince has been as closely as possible identified with the State itself, the Sovereign Power has nevertheless been distinguished in law from the person of the Prince, and the international relations between two such States have been considered to be maintained *de jure* between the two Crowns. Treaty-engagements between such States have accordingly not determined upon the natural or political demise of the Princes, who were the original parties to the treaties, but have been considered to

Absolute monarchies.

[1] Austin on Jurisprudence, p. 208.

attach to their Crowns, and the obligations of the treaties have devolved to their successors in the Sovereignty. In other forms of State-Government, the internal constitution of which allows direct negotiation with other States to be carried on in the name of the State itself, the continuity of the external life of the State has been equally exempt from any interruption by internal changes.

Determination of international life.

§ 19. There are however circumstances under which the international life of a State may determine. Thus a State may be merged in its entirety in another State, and become a province or department of that State; or it may be incorporated into a system of States, and become clothed with the Nationality of the Union. Thus the kingdom of Navarre has been merged in the kingdom of Spain, and has become a province of that kingdom; whilst the Duchy of Burgundy has been similarly merged in the kingdom of France: on the other hand, the Principality of Neuchatel and the Republic of Valais have both been incorporated into the Union of Helvetic States, and have severally ceased to maintain independent relations with Foreign Powers. Again, a State may undergo division, and be converted into two or more independent States; or it may be broken up, and its fragments may be absorbed into the neighbouring States. Thus the kingdom of the Netherlands underwent division in 1831, and was converted into the two independent kingdoms of Holland and Belgium; whilst the kingdom of Poland has been broken up and its fragments absorbed into the three neighbouring States. The international life of a State may determine at its own will, or by conquest, without the sanction of other States; but the transformation of an independent State into two or more independent

The kingdom of the Netherlands.

States, in other words, the creation of a new independent State, is not complete until other Nations have recognised its National character. It is the quality of Independence for the first time asserted on behalf of a State which requires recognition on the part of other Nations, not the increased or diminished extent of its territorial possessions. A State may indeed notify to other States any important additions to its territorial limits, which it may have acquired either by occupation or by cession, but such notifications are matters of courtesy for mutual convenience, and the announcement of the fact of any such acquisition is not obligatory upon the State which makes it. Thus the United States of North America might have annexed the territory of Texas, and might have thought fit to notify to other nations the addition of a new State to the Union, but the question of right was complete upon the admission of Texas into the Union under a Resolution of Congress, and the annexation required no recognition from third parties to give it effect. On the other hand, the transformation of the ancient kingdom of New Spain into the several independent Republics of Central America required recognition from other Powers, before it could be regarded as internationally complete, as the result of that transformation was to give birth to new independent political bodies.

Annexation of Texas.

§ 20. A Dependency may separate itself from the independent political community of which it has been a member, and may declare itself an Independent Sovereign State; and so long as the new State confines its action within the Civil Society of which it is composed, it does not require any recognition of its *Sovereignty* from other States. But if it seeks to hold international intercourse with other States, and

International recognition of Independence.

claims to be received into the fellowship of Nations upon terms of equality and reciprocity with other Nations, it must obtain from them the recognition of its *Independence* as a preliminary step. Every other State is at liberty to grant or withhold this recognition, subject to the consequences of its own conduct in this respect; as for instance, if it grants such recognition, it may incur the hostility of the State from which the new State has separated itself; if it refuses such recognition, it may incur the hostility of the new State or its allies; but until such recognition has been universal on the part of other States, the new State is entitled to the exercise of international privileges in relation to those States only which have recognised its independence[2]. This recognition may take place explicitly under the express provisions of a treaty of friendship or alliance, in which the independence of the new State is guaranteed by its ally: thus France recognised and guaranteed the independence of the United States of America by the treaty of Paris[3] (Feb, 6, 1778); and Prussia in a similar manner recognised and guaranteed the Confederation of the Rhine by the Treaty of Tilsit[4], (July 7, 1807); or by implication, upon the mutual interchange of accredited envoys, whereby either State acknowledges *de facto* the competency of the other to negotiate and contract engagements under the Law of Nations.

Treaty of Paris, Feb. 6, 1778.

Internationa l life not determined by political changes within a State.

§ 21. The International Life of a State is not determined by an internal Revolution, whereby the Supreme Power of the State is transferred from one portion of the body politic to another portion. A State does not enjoy any international rights by rea-

[2] Wheaton, Part I. c. 2. § 6. [3] Martens, Recueil, II. p. 605.
[4] Ibid. VIII. p. 641.

son of its peculiar internal organisation, and it therefore does not forfeit any such right by a modification of its internal constitution, neither can it thereby discharge itself from any of its obligations towards other Nations. Pending a Revolution, the ordinary relations of a State towards other States may be interrupted owing to the suspended action of the Supreme Power of the State, and its temporary inability to direct the will of the entire community. But the interruption of ordinary international intercourse is an abnormal state of things, which ceases immediately upon the restoration of internal order within the State, and if the Revolution fails, the *status ante* revives: if, on the other hand, the Revolution proves successful, the government *de facto* succeeds to the rights and obligations of its predecessor in all international matters, and intercourse is resumed with other nations on that understanding. There may be exceptions however to this rule with respect to certain treaty-engagements, which come under the general division[5] of *personal* as contradistinguished from *real* treaties. Of such kind was the famous treaty of alliance[6] concluded in 1761, under the name of the Family Compact, between the Very Christian King and the Catholic King, and to which the other reigning Princes of the House of Bourbon were invited to accede. The engagements of this treaty necessarily determined from the moment when the princes of the House of Bourbon ceased to reign in France.

Personal Treaties.

The Family Compact of 1761.

§ 22. On the other hand, the identity of a Republican State in respect of *real* treaties is not destroyed by its conversion into a Monarchical State; "Every alliance," writes Vattel[7], "made by a Republic is in

Real Treaties.

5 Vattel, B. II. c. 12. § 183. Wolff, Jus Gentium, § 414.

6 Martens, Recueil, I. p. 16.

7 Vattel, B. II. c. 12. § 185.

its own nature *real*, for it relates only to the body of the State. When a free People, a popular State, or an aristocratical Republic concludes a treaty, it is the State itself which contracts, and her engagements do not depend on the lives of those who were only the instruments in forming them; the members of the people or of the governing body change and succeed each other, but the State still continues the same. Since, therefore, such a treaty relates directly to the body of the State, it subsists, though the form of the Republic should happen to be changed, even though it should be transferred into a Monarchy. For the State and the Nation are still the same, notwithstanding every change that may take place in the form of the government, and the treaty concluded with the Nation remains in force as long as the Nation exists. But it is manifest that all treaties relating to the *form of government* are exceptions to this rule. Thus two popular States that have treated expressly, or that evidently appear to have treated with the view of maintaining themselves in concert in their state of liberty and popular government, cease to be allies from the very moment that one of them has submitted to be governed by a single person." "Enimvero si in fœdere consensum sit, quod statui non nisi populari proprium sit, per se patet, sublato statu populari tolli etiam fœdus, ac per consequens mutata reipublicæ forma idem finiri[8]."

Sovereignty distinct from Independence.

§ 23. Grotius has been content to define a State to be a complete body of free persons, associated together to enjoy peaceably their Right, and for their common benefit[9]; and has declared the mutual relations of such bodies to be the objects of Public Law.

[8] Wolff, Jus Gentium, § 416.

[9] De Jure Belli et Pacis, L. I. c. 1. § 14.

Wolff[10] has not adopted any different view when he defined a nation as "multitudo hominum in civitatem consociatorum." Vattel, on the other hand, has defined States or Nations as "societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength[11];" but he has subsequently endeavoured to attain to greater precision, when he says, that "every Nation that governs itself, under what form soever, without dependence on any foreign power, is a *Sovereign State*. Its rights are naturally the same as those of any other State. Such are the moral persons who live together in a natural society, subject to the Law of Nations. To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really *sovereign* and *independent*; that is, that it govern itself by its own authority and laws[12]." Vattel, however, has gone too far in combining Sovereignty with Independence as the *criteria* of Nationality; for Sovereign States are not necessarily Nations, while States internationally independent are not always Sovereign Powers. Thus the States of North America which compose the Federal Union are all Sovereign States, but the nationality of each State is merged in the nationality of the Union. Under the Federal compact, the members of the Union have precluded themselves from entering severally into treaty-engagements with Foreign Powers, and they can only enter into such engagements jointly as an Union of States, the treaty-making power being under the constitution of the Union vested in the Federal Government. The States have accordingly ceased to be severally Independent Bodies

The United States of America Sovereign States.

[10] Wolff, Jus Gentium, Prolegomena, § 2. [11] Préliminaires, § 9.
[12] Droit des Gens, L. I. c. 1. § 4.

Politic, and their respective rights and obligations are not the subjects of international law, but are regulated by the constitutional law of the Union. The relations of the Union, on the other hand, towards the several component States are similarly determined by the Federal Compact, whilst the relations of the Union itself towards Foreign States are regulated by a law independent of the Federal Compact; to wit, the Law of Nations. On the other hand, there may be States which maintain independent relations with other nations, but have not full rights of sovereignty.

The States of the Roman Empire of the Germans Independent, but not Sovereign States.

Thus the States of the Roman Empire of the Germans enjoyed, subsequently to the peace of Westphalia, the right to form offensive and defensive alliances amongst themselves and with Foreign Powers, yet no alteration took place in their feudatory relation to the Chief of the Empire, as their Supreme Lord or Suzerain, until 1806, when the Emperor Francis II declared the Germanic Empire to be dissolved, and released the Electors, Princes, and States from their allegiance to him as Chief of the Empire. They thereupon became for the first time Sovereign Powers. So the Barbary States, although tributaries of the Ottoman Porte, and subject to the Suzerainty of the Sultan of Constantinople, have exercised the right of entering into treaty-engagements, as Independent Powers, with the Christian Nations of Europe.

Semi-Sovereign States a solecism.

§ 24. Some of the more recent writers on the Law of Nations, such as Martens[13], Klüber[14], and Heffter[15], have applied the distinctive epithet of *Semi-Sovereign* to such States as are recognised as Independent States under the Public Law of Europe, but have

[13] Précis de Droits des Gens, § 20. [14] Droit des Gens, § 24.
[15] Heffter, Das Europäische Völkerrecht, § 19.

not complete rights of Sovereignty. The term *Semi-Sovereign* seems to have been introduced by John Jacob Moser, in his "Essays on the Law of Nations in time of Peace[16]." Heffter, although he recognises the classification, considers it to be objectionable; and Wheaton has observed, that, "the denomination of *Semi-Sovereign States* is an apparent solecism in terms. As no State," he says, "can be considered at once sovereign and subject, so no State can with strict propriety be considered as half or imperfectly supreme. But as some States are by special compact dependent upon other States with respect to the exercise of certain rights essential to perfect sovereignty, such States have been termed Semi-Sovereign States."

Conventional Independent States.

§ 25. It is not desirable that this classification of certain States as Semi-Sovereign States should find a place in a system of law which is concerned only with the external relations, which States bear to one another as *independent* political communities[17]. The term itself, "Semi-Sovereign," points at once to another system of political law, and suggests rather a subordination of position analogous to that in which the Princes and States of the Germanic Empire stood in former days relatively to the Emperor as their Suzerain or Supreme Lord, than a modification of the manner in which the foreign relations of an *independent* State, as such, are maintained. The international rights of the States, which rank in this category, are in *substance* as complete as those of any other independent State, and it is only in the *mode* in which those rights are exercised that a distinction

[16] Beyträge zum Völkerrecht in Friedenzeiten I. p. 508, cited by Gunther I. p. 120.

[17] Neyron in his Principes du droit des Gens Européens, (Brunswic, 1763), adopts the division of States of the First Order and States of Second Order, meaning by the latter term States under a feudal Suzerain.

is found to exist. Independent States in their normal condition communicate immediately with one another; but there are exceptional instances in which the communications of an Independent State with Foreign Powers are carried on through the medium of a third Power, which has been acknowledged by public treaties as the authorized organ of such communications. In certain of these cases the Intermediate Power has been recognised by Foreign States as exercising a *protection* (patrocinium) over the weaker State, and has been acknowledged in terms as the Protecting Power. The designation of *Protected States*[18] would accordingly seem *prima facie* to be appropriate to these States in a system of international law, as being suggestive of their essential peculiarity; but as there are many protected States, which in accepting that character have abdicated altogether their independence, and do not maintain independent political relations under any modification with Foreign Powers, the designation of "*Protected States*" would be not sufficiently precise, and it would be necessary, in order to avoid confusion, to distinguish them further as *Protected Independent States.* But a definition less open to objection is suggested by the consideration that the independence which this class of States enjoys is regulated in its mode of exercise by Public Conventions. Their independence therefore may fitly be characterised as a *Conventional Independence*, in contradistinction to the *Natural Independence* which the more powerful States enjoy under the common Law of Nations.

Protected States.

[18] Grotius, L. I. c. 3. s. 21. § 3, recognises States which by treaty are 'sub patrocinio, non sub ditione,' and Bynkershöek, Quæst. Jur. Publici, L. I. c. 9, speaks of States 'qui sub tuitione sunt.'

§ 26. The origin of these *Protected* Independent States is to be referred either to special treaty-engagements between two States, under which the stronger Power has granted its protection to the weaker State, and their treaty-engagements have been formally recognised by the European Powers; or to some general treaty amongst the European Powers, under which the Protecting Power has undertaken to protect the weaker State, and the other Powers have engaged themselves to hold political intercourse with the weaker State only through the medium of the Protecting Power. In the case of Protected States, which are not members of the Family of Nations, the relations between them and the Protecting Power are for the most part founded upon some compact[19] between them, but as the protected State does not maintain any relations whatever with Foreign Powers, it is virtually a dependency of the Protecting Power, being distinguished from ordinary dependencies in this respect, that its rights are secured and its obligations limited by compact. It is a dependency *sub modo*, as distinguished from an absolute dependency.

Independent States protected under Public Treaties.

The Native States of India are instances of Protected Dependent States, maintaining the most varied relations with the British Government under compacts with the East India Company. All these States acknowledge the supremacy of the British Government, and some of them admit its right to interfere so far in their internal affairs, that the East India Company has become virtually sovereign over them. None of these States, however, hold any poli-

Native States of India.

[19] In the nature of an unequal alliance *cum diminutione imperii*. Grotius, L. II. c. 15. s. vii. § 2.

tical intercourse with one another or with Foreign Powers[20].

Principality of Monaco.

§ 27. The Principality of Monaco and the Seignory of Kniphausen are instances in Europe of Protected Independent States, the relations of which towards the Protecting Power are settled by special treaty-engagements between the States themselves and the Protecting Powers, and which have been subsequently recognised by the European Powers. Thus the Prince of Monaco, in order to disembarrass his Capital of a Spanish garrison, which had usurped possession of it at a period when the Duchy of Milan was still an appanage of the Spanish Crown, entered into a treaty with Louis XIII. of France (Convention of Peronne, 14 Sept. 1641)[21], whereby he placed himself under the protection of the King of France, who undertook thenceforth to maintain at his own charge a garrison of five hundred French soldiers in Monaco. This Treaty continued in force and operation down to 1792, when the National Convention of France incorporated the Principality of Monaco, including the three communes of Monaco, Mentone, and Roccabruna, into the French Republic, and constituted it within the Department of the Maritime Alps. By the subsequent Treaty of Paris[22] (30 May, 1814), concluded between France on the one part and Austria and her allies on the other, France renounced possession of Monaco, and the ancient relations between the Prince of Monaco and the King of France, such as they

Convention of Peronne, 14th Sept. 1641.

[20] An account of six classes of Protected States in India, is given in "Sketches of the Relations subsisting between the British Government of India and the different Native States," by Captain J. Sutherland. Calcutta, 1833. British and Foreign Review (1839), vol. viii. p. 154.

[21] Schmauss, Corpus Jur. Gentium Academicum, I. p. 521.

[22] Martens, N. R. II. p. 5.

existed before 1 Jan. 1789, were recognised to be once more in force. By the subsequent Treaty of Paris[23], (20 Nov. 1815,) concluded between the four Allied Powers severally on the one part, and France on the other, it was declared that the relations re-established by the Treaty of 30 May, 1814, between France and the Principality of Monaco, should be at an end, and that analogous relations should thenceforth exist between that Principality and the King of Sardinia. Those relations were subsequently defined by the Treaty of Turin[24], (Nov. 7, 1817,) concluded between the King of Sardinia and the Prince of Monaco, almost literally in the words of the Convention of Peronne (*mutatis mutandis*). Thus the King of Sardinia is to maintain a garrison at his own expense in Monaco, which is to be under the command of the Prince of Monaco, as Governor for his Majesty, and the King is not to interfere with the Prince's rights of Sovereignty in other respects. The King of Sardinia undertakes to defend the Prince of Monaco against foreign enemies, to include his name in all treaties of peace, and to allow him to use the Royal Standard of Sardinia in time of war. The Principality meanwhile has its own commercial flag, and Consuls are accredited by the King of Sardinia to reside at Monaco in order to watch over the commercial interests of Sardinian subjects in that port, precisely as in the ports of other Independent States. The integrity of the Principality has been materially affected by the annexations of Mentone and Roccabruna to Piedmont in 1848, when the inhabitants of those districts, dissatisfied with the administration of the reigning Prince, voted their annexation to Piedmont.

Treaty of Paris, 20 Nov. 1815.

Treaty of Turin, 7 Nov. 1817.

[23] Martens, N. R. II. p. 687.

[24] Articles de Protection, Martens, Nouveau Supplément, II. p. 343.

Cession of Mentone and Roccabruna to France.

The annexation of these districts was accepted by the Sardinian Parliament and sanctioned by the King of Sardinia, whilst the Prince of Monaco has recorded a protest[25] against the wrongful act of the Protecting Power.

The Lordship of Kniphausen.

§ 28. The Seignory or Lordship of Kniphausen stands in a more anomalous relation to the Grand Duke of Oldenburg. The State of Kniphausen had originally been a *sub-feudum* of the Holy Roman Empire, held *mediately* by its Lord through the Feudal Court of Brussels. After the Emperor of the Romans had by the Treaty of Campo Formio[26], (17 Oct. 1797,) renounced possession of the Belgian Provinces, known as the Austrian Low Countries, in favour of the French Republic; and after this renunciation on the part of the Emperor had been further recorded with greater formality in the Treaty of Luneville, (9 Feb. 1801[27],) Kniphausen was constituted an immediate fief of the German Empire by the Decree of the Deputation of the Empire on 25th Feb. 1803. Upon the subsequent dissolution of the Roman Empire of the Germans in 1806, which was a necessary consequence of the Treaty of Presburg, (26 Dec. 1805,) concluded between the Emperor Francis and the Emperor Napoleon, and which paved the way for the Confederation of the States of the Rhine, (Paris, 12 July, 1806,) the Lord of Kniphausen became an

[25] These districts, as forming part of the arrondissement (circondario) of Nice have since been ceded by the King of Sardinia to the Emperor of the French, under the Treaty of Turin (24 March, 1860), whilst the remainder of the Principality of Monaco still continues to be an Independent State under the Government of the Hereditary Prince Charles III. By a subsequent Treaty concluded at Paris (Feb. 2, 1861) between the Prince of Monaco and the Emperor of the French, the Communes of Mentone and Roccabruna have been definitively ceded to France.

[26] Martens, Recueil, VI. p. 421.

[27] Ibid. VII. p. 296.

independent Sovereign Power. His independence however was of short duration. The Emperor Napoleon occupied the territory of Kniphausen, and subsequently transferred it under the Treaty of Tilsit to the Emperor of Russia, who ceded it to the Duke of Oldenburg. Upon the restoration of peace in 1815, when the Sovereign Princes and Free Cities of Germany, feudatories in former days of the Germanic Empire, united themselves together on a footing of equality as members of the Germanic Confederation, the Lord of Kniphausen was not admitted into the Confederation, in deference to the objections of the Emperor Alexander of Russia. Negotiations however on the subject of Kniphausen were originated at the Congress of Aix-la-Chapelle in 1818, and led to the conclusion of the Treaty of Berlin[28], (8 June 1825,) between Count Bentinck of Kniphausen, and the Duke of Oldenburg, under the mediation of Russia, Prussia, and Austria. Under this Treaty the Count agreed that the Duke of Oldenburg should exercise over him and his family, as territorial Lords of Kniphausen, a supremacy analogous to that which had appertained to the Emperor of Germany before the dissolution of the Empire. The Seignory of Kniphausen, by virtue of this *conventional* subordination of its Lord to a member of the Germanic Confederation, became appurtenant to the lands of the Confederation; and the Treaty itself was guaranteed by the Germanic Confederation in its character of an European Power. The result of these treaty-engagements was twofold. Under the Treaty of Berlin the Duke of Oldenburg was bound to discharge towards the Counts of Kniphausen duties of Protection analogous to those which the Emperor of Germany had dis-

Treaty of Tilsit.

Treaty of Berlin, 8 June, 1825.

[28] Meyer, Staats-Acten des Deutschen Bundes, II. p. 289.

charged, whilst the Empire existed, towards his feudatories; whilst the Germanic Confederation was bound under the Federal Act to defend the territory of Kniphausen against foreign aggression, by virtue of its recognised subordination to a member of the Confederation. The State of Kniphausen meanwhile retained its own *commercial* flag, but the Duke of Oldenburg, under the ninth article of the Treaty of Berlin, was constituted the *political* representative of the Lord and his subjects in their relations with Foreign Powers.

The United States of the Ionian Islands.

§ 29. The United States of the Ionian Islands are, on the other hand, an instance of an Independent State placed by the provisions of a general treaty under the immediate and exclusive Protection of another Independent Power. The Seven Islands had formed a portion of the maritime possessions of the Republic of Venice antecedent to 1797, when they passed under the sovereignty of the French Republic. They were subsequently occupied by the joint forces of Russia and the Ottoman Porte, and were constituted under the treaty of Constantinople[29], (21 March 1800,) concluded between those two Powers, tributaries of the Sultan, as their Suzerain and Protector, in like manner as the Republic of Ragusa had been an Independent State under the protection of the Sultan since the 14th century. The Seven Islands were subsequently recognised as an Independent Republic in 1802, under the Treaty of Amiens[30]. Under the secret articles of the Treaty of Tilsit, the Emperor of Russia, in contempt of his guaranty towards the Ottoman Porte, transferred the Seven Islands in full sovereignty to France. During the subsequent course of the war, Great Britain acquired

Treaty of Constantinople, 21 March, 1800.

Treaty of Amiens.

Treaty of Tilsit.

[29] Martens, Recueil, VII. 41. [30] Martens, N. R. III. p. 13.

possession of six of the Islands, but Corfu remained in the hands of the French down to 1814, when it was ceded under the Treaty of Paris to the Four Allied Powers, and was consequently reserved for their joint disposal, in conformity with the provisions of the Treaty of Pilnitz, as an acquisition made by them in common during the war. Although, therefore, the six smaller Islands were by right of conquest at the absolute disposal of Great Britain, Corfu could only be disposed of with the common consent of the Four Allied Powers; Great Britain, as it appears from Lord Castlereagh's Memoirs[29], had contemplated in 1814 that a direct Sovereignty over these islands should be given to some acknowledged European Power, and preferred either the King of Sicily or the Emperor of Austria. On the other hand, Count Capo d' Istrias, a native of Corfu, who was in the intimate councils of the Emperor Alexander, suggested to that Sovereign that the Islands should be recognised as an independent State, and be placed under the protection of Great Britain. The Emperor Francis repudiated altogether the notion of a strictly continental Power like Austria embarrassing itself with the charge of insular possessions. Great Britain on the other hand was extremely reluctant to accept the position of a Protecting Power[30], and at first withdrew the Six Islands, over which she had an absolute right of disposal, from the proposed common arrangement. Great Britain at last consented to accept the charge of Protector of all the Seven Islands at the urgent instance of the Emperor Alexander, who stated in Conference with the other Powers, that he had pledged himself that the Islands should nei-

[29] Letter of Lord Castlereagh to Lord Liverpool, vol. x. p. 224.

[30] Lord Bathurst to Lord Castlereagh, vol. x. p. 441.

ther be incorporated into any other State, nor become the vassals of any Suzerain ; but should enjoy a constitution which would secure their material independence ; and as Great Britain could alone satisfy what he considered to be a right of the Ionians, it was the duty of Great Britain to accept the government of the Seven Islands. The result was embodied in three separate Conventions of identical tenor, executed at Paris[31], (5 Nov. 1815), between Great Britain and her three allies, Russia, Austria, and Prussia respectively, under which the Seven Islands were declared to form a Single Free and Independent State under the immediate and exclusive protection of the King of Great Britain and Ireland. The trading flag of the United States of the Ionian Islands was acknowledged by the contracting parties as the flag of a Free and Independent State, and none but commercial agents or consuls, subject to the regulations to which commercial agents or consuls are subject in other Independent States, were to be accredited to the United States. All the Powers which signed the Treaty of Paris, (30 May, 1814,) and the Act of the Congress of Vienna, (9 June, 1815,) and also the King of the Two Sicilies and the Ottoman Porte, were to be invited to accede to the Conventions. The King of the Two Sicilies recognised the Protectorate of the King of Great Britain by the Convention of London[32], (26 Sept. 1816,) and the Ottoman Porte by a Special Act[33], (24 April, 1819,) renounced

Convention of Paris, 5 Nov. 1861.

31 The Austrian Treaty is in Martens, N. R. II. p. 663, and in the British and Foreign State Papers, 1815, 1816. The Russian Treaty is in the Annual Register for 1815. The Prussian Treaty is in the Collection of Treaties, (Preussen's Staatsverträge,) published in Berlin, 1852, p. 784.

32 Martens, Traités, N. R. V. p. 116.

33 Ibid. p. 387.

its sovereignty over the Seven Islands and their dependencies in favour of the King of Great Britain, as the Sovereign Protector of the Islands.

Neutrality of a Protected Independent State.

§ 30. The history of the Ionian Islands during the late war between Russia and the Ottoman Porte is illustrative of the practical inconvenience of adopting the epithet "Semi-Sovereign," as representing the International Status of a *Conventional Independent* State. The connection between the Seven Islands and the United Kingdom of Great Britain and Ireland is purely *personal*. The King of Great Britain and Ireland exercises authority over the Ionian States not *Jure Coronæ*, but simply *ex Pacto;* and the Ionian People are *Ionian subjects*, not subjects of the *British Crown*. The Ionian States accordingly do not necessarily follow the fortunes of the Crown of Great Britain and Ireland in war and in peace; they may remain neutral, like other independent States, whilst the Protecting Power is engaged in hostilities with other Powers, and they do not participate in the advantages of any treaty-engagements entered into by the King of Great Britain and Ireland, until he has stipulated specially in behalf of Ionian subjects in his character of the Protecting Power of the United Ionian States. At the commencement of the war with Russia, the Executive Government of Great Britain, under a misapprehension that the Protecting Power of a so-called Semi-Sovereign State had certain paramount rights of Sovereignty over it, refused to recognise the neutrality of Ionian subjects, and a decision of a British Court of the Law of Nations[34] was invoked on behalf of Ionian subjects to clear away the misapprehension. The classification of this order of States under the head of Conventional Independent

34 The Leucade. Admiralty Prize Cases, 1854—56, p. 217.

States, as already suggested, is calculated to prevent misapprehensions of a like nature in other cases by directing attention at once to their special character.

The Free City of Cracow.

§ 31. Much confusion of thought has arisen from a similar cause respecting the International Status of the City of Cracow and its territory. On the dissolution of the ancient kingdom of Poland, the City of Cracow and the territory assigned to it was under the Convention of St. Petersburg[35] (13 Oct. 1795) evacuated by the Prussian Armies, and united to the Austrian Monarchy, from which it was again severed by Napoleon, and by the subsequent Treaty of Vienna[36] (14 Oct. 1809) was attached to the Duchy of Warsaw, then belonging to the King of Saxony. This latter Duchy, being a new State created by the Emperor Napoleon, was in fact a fourth division of the ancient Kingdom of Poland in favour of a fourth occupant. The issue of the campaign of 1812, placed the Emperor Alexander in possession of the various portions of territory, which had served by their union to make up the Duchy of Warsaw, and which were subsequently redistributed between Russia, Austria, and Prussia, under two separate treaties, concluded between Russia and the two other Powers respectively at Vienna (3 May, 1815[37]). An additional treaty[38] of the same date, concluded between the three Powers, provided that the City of Cracow with its territory should be regarded (*sera envisagée*) for ever, as a free, independent, and strictly neutral city, under the protection of the three High Contracting Powers. The Three Courts under the sixth article engaged themselves to respect, and cause to be

Convention of St. Petersburg, 24 Oct. 1795.

Treaty of Vienna, 14 Oct. 1809.

Treaties of Vienna, 3 May, 1815.

35 Martens, Traités, R. VI. p. 171.

36 Ibid. N. R. I. p. 211.

37 Martens, Traités, N. R. II. p. 225.

38 Ibid. p. 251.

respected on all occasions, the neutrality of the Free City of Cracow and its territory. An armed force was not to be introduced into it upon any pretext whatever at any time. In return, it was understood, and expressly stipulated, that there should not be granted within the Free City or upon the territory of Cracow any asylum or protection to fugitives from justice, or to deserters from the dominions of any of the Three Contracting Powers, but that such persons should be immediately surrendered upon a demand of extradition made by the competent authorities. It was further provided, that the City of Cracow should not have the right of levying custom duties, but only pontage and road tolls upon the transit of goods and cattle, according to a tariff regulated by the Commissioners of the Three Powers. The other Articles of the Treaty regulated the political constitution of the Free City, and settled various matters of civil and ecclesiastical administration. A further Treaty between the Three Allied Powers of the same date completed their mutual engagements in relation to the Duchy of Warsaw and the various territories which had made up the ancient Kingdom of Poland, as it existed in 1772. Under this Treaty, each of the Contracting Parties was to be at liberty to establish Consuls or Commercial Agents in respect to the Duchy of Warsaw, subject to the usual recognition under the Constitution as approved by the Three Powers; but no similar provision is found in the Treaty relative to Cracow, and the omission of all provision in regard to Consuls or Commercial Agents is an important peculiarity in that Treaty.

Its Internal Constitution a subject of Treaty.

§ 32. The Internal Government of the Free City of Cracow and its territory was to reside in a Senate consisting of Twelve Senators and a President. The

Legislative Power was committed to the Senate and an Assembly of Representatives, the latter body having the right of controlling the administration by examining the accounts, voting the budget, and impeaching the public functionaries, if suspected of peculation. The Peace of the City and the Police of the Roads was to be maintained by a civic militia. This Constitution was annexed to the Treaty, which placed it formally under the common guaranty of the Three Contracting Powers. It has been a matter of subsequent diplomatic discussion upon what principle the European Powers, who took part in the Congress of Vienna, acted in admitting this Treaty between the Three Powers to be inserted in the text of the Principal Act of the Congress. A slight modification was made in the language of the Article respecting the City of Cracow and its territory as inserted in the Principal Act, namely, the City of Cracow is declared (*est declarée* instead of *sera envisagée*) to be for ever a free and independent and strictly neutral City under the protection of Russia, Austria and Prussia. With this exception, the language of the Article in the Triple Treaty and in the Act of the Congress is identical. It is known that the introduction of the provisions of the Triple Treaty into the General Act of the Congress was objected to by Austria, as devoid of political meaning, and as inconsistent with the intention of the Protectorate, and that the Emperor Francis reluctantly admitted its insertion in deference to the reiterated instances of the Emperor Alexander. It was subsequently maintained on behalf of the Three Courts[39], when their common intention to suppress the independent existence of Cracow was an-

Principal Act of the Congress of Vienna.

View of the Three Courts as to the Sup-

[39] Despatch of Prince Metternich to Count Dietrichstein, 6 Nov. 1846. Martens, N. R. Gen. T. X. p. 55.

nounced to France and Great Britain in 1846, "that they had merely presented to the Congress of Vienna, for registration in the General Instrument termed the Principal Act of the Congress, the Convention which they had concluded with one another, and that the other Powers, who signed the Principal Act of the Congress, or the General Treaty, did no more than receive that combination, as the result of the direct negociations between the Three Courts, without interfering in that territorial arrangement to which they were strangers." France[40], however, in reply, denied that the Independent Powers, who signed the Principal Act, merely registered the decisions and acts of the Three Powers who were Parties to the Triple Treaty, and contended that the foundation of the Republic of Cracow was placed in the same rank with the stipulations which formed other States, established Kingdoms, recognised the Free Cities of Germany, created the Germanic Confederation; and that the virtual insertion of the Triple Treaty textually in the General Act was intended to give to the existence of the Republic of Cracow much stronger and more authentic guaranties; and accordingly that all the Powers, which were Parties to the Treaty of Vienna, had an incontestable right to take part in the deliberations and decisions of which the Republic of Cracow might be the object. Great Britain[41], to the same effect, asserted, that, with whomsoever might have originated the plan of erecting Cracow and its territory into a Free and Independent State, that

Cession of Cracow in 1846.

French view.

British view.

[40] Note of M. Guizot addressed to Count Flahaut in reply to the Despatch of Prince Metternich, 4 Dec. 1846. Martens, N. R. Gen. T. X. p. 118.

[41] Despatch of Lord Palmerston to Lord Ponsonby, 23 Nov. 1846. Martens, N. R. Gen. T. X. p. 110.

plan was carried into effect by stipulations to which all the Powers were equally parties, and consequently it was not competent for three of those Powers by their own separate authority to undo that which was established by the common engagements of the whole. The Three Powers, on the other hand, conceived themselves at liberty to modify or annul the Triple Treaty, and to stipulate other conditions by free and reciprocal agreement. They accordingly agreed, that, as the Protected State had violated the obligation of neutrality imposed upon it as a condition of its existence under the Triple Treaty, they were not merely at liberty, but were bound in self-defence to declare the Triple Treaty to be at an end; and as the Protected State had destroyed by its own act the work which the Protecting Powers had founded, they were not bound to reestablish it, but might allow the state of Possession anterior to 1809 to revive. The Two Western Powers, on the contrary, protested formally against the suppression of the Republic of Cracow as at variance with the letter as well as with the spirit of the General Treaty of Vienna, and as in their opinion not warranted by any adequate necessity.

Cracow and the Ionian Islands.

§ 33. It is not easy to understand in what peculiar circumstances certain distinguished publicists[42] have discovered so wide a distinction between the Free and Independent City of Cracow, under the joint Protectorate of the Three Powers, and the Free and Independent State of the United Ionian Islands under the sole and exclusive Protection of Great Britain, as to declare that the former is to be regarded as a completely Sovereign State, whilst the latter has undergone a material abridgement both in

[42] Martens, L. I. c. 11. § 20. Wheaton's Elements, Part I. c. 11. § 13.

its Internal and External Sovereignty. As far as External Sovereignty was concerned, no European Power could place itself in connection with the State of Cracow, politically represented as it was under the General Treaty of Vienna by the Three Powers, except through the medium of one of the Three Courts: in a similar manner, it was only through one of the Three Courts that the State of Cracow could address itself to Foreign Governments; and the triple Protectorate was as exclusive in the case of Cracow, as the single Protectorate in the case of the Ionian Islands. If a careful comparison is instituted between the condition of these protected Independent States, and the condition of the Free City of Cracow, it will be seen that the Ionian Islands enjoy far more of the rights which pertain to an Independent State, than the Free City of Cracow. The latter State was by the Triple Treaty declared not to have the power to levy any custom duties; whereas the Ionian Parliament has full power to impose custom duties upon imports and exports, as well as to levy other taxes. Cracow had neither a commercial flag by treaty nor commercial agents in foreign countries, whilst the Ionian Nation has both; and the Lord High Commissioner, although he is nominated by the Protecting Power, does not exercise his authority according to the behests of the Protecting Power, but according to the Constitutional law of the Ionian States, being in fact not a British, but an Ionian authority.

The extinct Republic of Poglizza.

§ 34. The Republic of Poglizza, in Dalmatia, is cited by Martens, Wheaton, Heffter, and Dr. Phillimore as an existing instance of a Semi-Sovereign State under the protection of Austria. Poglizza, however, ceased to exist as an Independent State in

1807, on the occupation of Dalmatia by the French armies. The origin of this Republic, the name of which signified "a small field," dated from a period antecedent to the Ottoman invasion of Europe. It consisted of twelve towns or villages, with a population of about 4000 souls, and a territory of about forty Italian miles in circumference, the capital of which was Gatta, where the Velisbor, or Great Council, was held. Their first rights were granted to them by the Kings of Hungary, and the same were subsequently confirmed to them by the Republic of St. Mark, to which they became tributary and furnished mercenary troops, obtaining from the Venetians certain advantages in return. Upon the suppression of the Venetian State by the Emperor Napoleon, Poglizza passed under the Protection of Austria, and continued in the enjoyment of its Independence, until it was destroyed amidst the conflicts between the Russian forces under Siniavin and the French armies under Marmont[43].

The Republic of Andorre.

§ 35. Andorre is a small Republic, situated between the Pyrenees of Arriège in France and the Pyrenees of Catalonia in Spain. It has been classed by some writers amongst *neutral* Independent States, but its proper place is amongst *protected* Independent States. Its independence dates from the reign of the Emperor Louis le Debonnaire, who by a Charter issued in the year 801, and still preserved in the Archives of the Republic, constituted the People of Andorre an Independent State, with liberty to elect a Count as their Protector. They accordingly chose for their Protectors the neighbouring Counts of Foix. The Emperor Charlemagne had, prior to the Charter of

43 Mémoires du Marechal Duc de Raguse, III. p. 49. Sir Gardiner Wilkinson's Dalmatia and Montenegro, II. p. 195.

his son Louis le Debonnaire, granted the tithes of the six parishes, which make up the Republic of Andorre, to the See of Urgel in Catalonia, but he had granted at the same time to their inhabitants a distinct military organization. His grandson, Charles the Bald, disregarding the Charter of Louis le Debonnaire, issued, in the year 860, a Diploma, whereby the Sovereignty over Andorre was assigned to the Bishops of Urgel. This wrongful act gave rise to a war between the Bishops of Urgel and the State of Andorre, which lasted for a period of four hundred years, and in which the Counts of Foix took part as Protectors of the Republic. Hostilities were at length brought to a close by a Treaty, under which the Bishops of Urgel and the Counts of Foix were recognised as joint Suzerains over Andorre. This joint Suzerainty, however, has in course of time become converted into a joint Protectorate, and the Protectorate exercised by the Counts of Foix has devolved to the Imperial Successor of the French branch of the House of Bourbon[44]. The Emperor of the French and the Spanish Bishops of Urgel are now therefore joint Protectors of the Republic of Andorre, which is governed by a Domestic Executive, consisting of two Syndics, who are annually elected by a National Legislative Body, consisting of twenty-four Consuls or Delegates elected by the six parishes. The territory of Andorre is about thirty miles in length and twenty in breadth; the population is estimated at about eight thousand; and an armed force of full fifteen hundred men is always prepared to defend the independence of the Country[45].

44 The family of the Counts of Foix became absorbed into the House of Bearn, and the House of Bearn in its turn was absorbed into the House of Bourbon.

45 Historia de la Republica d'Andorra. Barcelona, 1848. The Edinburgh Review, No. 230.

The Republic of San Marino.

§ 36. San Marino is an instance of an Independent Republic under the Protection of the Holy See, and surrounded, until very recent times, by the dominions of the Protecting Power. Tradition refers its origin to the fifth century. The extent of its territory and the number of its population are nearly equal to those of the Republic of Andorre, but it has not a like military organization, the armed force of the State consisting of only about eighty men. Its independence was for a short time in the last century suspended by Cardinal Alberoni, but it subsequently recovered its ancient liberties, and the Emperor Napoleon formally recognised its Independence, when he entered the Papal Dominions in 1797. It is governed by a Domestic Executive, consisting of two *Capitani Regenti*, who are elected for six months by an Executive Council of Twelve, the members of which are themselves popularly elected. This International Atom may fitly close the series of *protected Independent States*[46].

[46] This State is styled by Italian writers, La Republichetta. Gunther, Europäisches Völkerrecht, Tom. I. c. 1. § 19.

CHAPTER III.

NATIONAL STATE-SYSTEMS OF CHRISTENDOM.

Single or United States—Personal Union of Independent States—Real Union of Independent States—Federal Union of Norway and Sweden—Diversity of Federal Unions—The United States of America—The Constitution of 1787—The Articles of Confederation of 1778—The Confederate States of America of 1861—The Argentine Confederation—A Single State decentralized—The Constitution of the Argentine State—The Argentine Provinces—The Swiss Confederation of 1648—The Helvetic Confederation of 1815—The League of Sarnen of 1832—The Swiss Confederation of 1848—Analogy between the Swiss Confederation and the United States of America—Origin of the Germanic Confederation—Federal Act of 1815—Final Act of 1820—The Ordinary Assembly of the Diet—The Plenum or Full Chapter of the Diet—Permanent Character of the Germanic Confederation.

Single or United States.

§ 37. A NATION may be either a single Independent State, or an Independent System of States[1] united together by a federal compact, the conditions of which are susceptible of infinite variations. Thus a System of States may be *federally* united under an hereditary prince, or under an elective President, or under a representative Council, and in each of these cases the National Unity of the System may be as complete as in the case of a single Independent State. It is of importance, however, not to confound a Political Body of States, incorporated together *Jure Imperii* under a common Sovereign Prince, with a Federal System of States[2] united together *Jure Societatis*, which has been, as such, the subject of International recognition.

[1] Puffendorf, L. VII. c. 5. § 12.

[2] Sic etiam accidere potest, ut plures civitates arctissimo inter se fœdere colligentur et faciant σύστημα quoddam, ut Strabo non uno loco loquitur, neque tamen singulæ desinant statum perfectæ Civitatis retinere. Grotius, L. I. c. 3. § 7.

The internal constitution of a Political Body of States is altogether ignored by the Law of Nations, whereas the internal organization of a Federal System of States is the result of an International Compact; and whilst the external relations of the former Body towards Foreign Nations are of a normal kind, and are governed by the Common Law of Nations, the external relations of the latter System are of an exceptional character, and are the creatures altogether of Conventional Law.

Personal Union of Independent States.

§ 38. Two or more *Independent* States may be connected together by the link of a common Sovereign Prince under the Civil Law of the respective States. Such a connection has no International significance, inasmuch as each State retains its separate National Character. Where such a connection is of an accidental and temporary character, it has been termed by publicists a *Personal* Union; where it is of a necessary and permanent character, it has been designated a *Real* Union. This classification, however, is open to objection, seeing that in both cases the *person* of the Sovereign is the only link which connects the States; and as there is nothing in the nature of these Unions which implies Reality in an International sense, it would seem preferable to define such Unions in all cases as Personal Unions, and to distinguish them, according to their essential difference, into *temporary* and *permanent* Unions[3]. Thus the connection of the United Kingdom of Great Britain and Ireland with the Kingdom of Hanover by the link of a common Sovereign Prince during the reign of five successive

Great Britain and Hanover.

3 Klüber, Tom. I. § 27. in a note upon States united under the same Sovereign, says, Unio civitatum, sive *perpetua* sit, sive *temporaria*, fit jure (1) vel *societatis* (systema civitatum fœderatarum) (2) vel *imperii* (sub eodem imperante). Hæc est vel *personalis* vel *realis*.

monarchs of the House of Hanover, was a Personal Union of an *accidental* kind, depending upon the coincidence of the two Crowns devolving upon one and the same person under the Civil Law of Succession in either Kingdom; whilst the connection of the Kingdom of Hungary with the Germanic States of the House of Hapsburg-Lorraine, under one and the same Sovereign Prince, is a Personal Union of a *permanent* kind, inasmuch as the Act of Settlement of the Crown of Hungary (anno 1723), by extending the Order of Succession to the female descendants of Rodolph of Hapsburg, has made the Law of Succession in Hungary identical with the Law of Succession in the Germanic States of the House of Hapsburg-Lorraine, so that both Crowns devolve inseparably upon one and the same person. But in either case the *Personal* Union of the two Crowns has no *Real* International significance. The Hungarian Nation does not necessarily follow in peace and war the fortunes of the Germanic States of the House of Hapsburg-Lorraine, and the Emperor of Austria may enter into an international compact, to which he is not a party as King of Hungary.

Hungary and the Austrian Germanic States.

§ 39. There is another kind of Union of Independent States under one and the same Sovereign Prince, which has an International significance, and may deserve, in a Treatise on the Law of Nations, to be termed a *Real Union*, in contradistinction to the *Personal Unions* which have just been noticed. Thus, the States which are under the sceptre of the Head of the House of Hapsburg-Lorraine may be divided into Germanic and non-Germanic States. The Germanic States form part of the territory of the Germanic Confederation; they at the same time form part of the Austrian Empire, and their twofold National character has been the subject of International

Real Union of Independent States.

recognition. In a similar manner the Germanic States of the Head of the House of Hohenzollern form part of the territory of the Germanic Confederation, and at the same time form part of the Prussian Monarchy. The Duchies of Holstein and Lauenburg are, in an analogous manner on the one hand States of the Germanic Confederation, and on the other hand parts of the Danish Monarchy. German publicists have accordingly adopted a special term to distinguish in such cases the Whole or Entire Independent State. Thus the Prussian Monarchy, as distinguished from the Germanic and non-Germanic States which compose it, is styled a *Gesammstaat*, or Whole-State. The King of Prussia, for instance, may enter into treaty-engagements in behalf of the *Gesammstaat*, or entire Prussian Monarchy; or on behalf of the Germanic portion of it, or on behalf of the non-Germanic portion of it. So likewise the King of Denmark may enter into treaty-engagements on behalf of the *Gesammstaat*, or entire Danish Monarchy, which includes the two Germanic Duchies, or on behalf of the Germanic Duchies alone, or on behalf of the Danish Provinces alone. These very complicated conditions of International Life are peculiar to certain States which are members of the Germanic Confederation; the Constitution of which is recognised in the Final Act of the Congress of Vienna. The Kingdom of Holland supplies an instance of either kind of Union with a State of that Confederation. There is a *Real* Union between the Kingdom of Holland and the Duchy of Limburg, whilst the *person* of the Sovereign is the only link which unites that Kingdom to the Grand Duchy of Luxemburg. Limburg forms part of the Dutch Monarchy, whilst Luxemburg is as distinct from Holland, as Hanover was from Great Britain during the time

Gesammstaat or Whole-State.

when both States were subject to a common Sovereign Prince.

§ 40. The Union of the Kingdom of Norway and the Kingdom of Sweden comes under different considerations of Public Law. The kingdom of Norway had been *politically* united with the Kingdom of Sweden and with the kingdom of Denmark since the Union of Calmar (anno 1397[4]). That Union was dissolved *de facto* in the early part of the sixteenth century, when Gustavus Vasa reestablished the political Independence of Sweden, and founded a separate dynasty (anno 1523). The Independence of Sweden was formally recognised by Denmark at the peace of Stettin (anno 1570). Norway had meanwhile undergone a political change, and had become a province of Denmark (anno 1536), when its Senate was suppressed, and its Estates ceased to take part in the election of its Kings. Norway and Denmark thenceforth formed a single Independent State for all International purposes; the King of Denmark being recognised Internationally as King of Denmark and Norway. Such was the condition of Norway until the last year of the War of Liberation, when the King of Denmark by the Treaty of Kiel[5], (14 Jan. 1814,) to which Great Britain and Russia were also parties, ceded all his rights of Sovereignty over the kingdom of Norway to the King of Sweden, so "that Norway and its Dependencies should be a kingdom united to that of Sweden." This International set-

Federal Union of Norway and Sweden.

Treaty of Kiel, 14 Jan. 1814.

4 The monarchy in each kingdom had been an elective monarchy, prior to the Union of Calmar. Under the Act of Union the United monarchy was constituted an elective monarchy, and the monarch was to be elected by the common accord of the Senators, and the deputies of the three Kingdoms. Koch, Tableau des Révolutions, T. I. p. 274.

5 Martens, N. R. I. p. 666.

tlement was at first repudiated by the Norwegian people, but it was ultimately carried into effect by a Convention[6] concluded at Moss, (14 August 1814,) between the King of Sweden and the Norwegian Government. The Constitutional relations between the two kingdoms were subsequently settled by an Act[7], drawn up in common by the Diet of Norway and the Diet of Sweden; by which it was provided that the kingdom of Norway should form a Free and Independent kingdom, united to Sweden under the sceptre of one and the same monarch, each kingdom retaining its own *Civil* system, but both kingdoms having *one and the same International system.* Accordingly the King has full power on behalf of both kingdoms to declare war, make peace, conclude alliances, and accredit and receive Ministers Plenipotentiary, and has in all matters of war and peace the aid of an extraordinary Council of State, composed of Norwegians and Swedes in common. Meanwhile, each kingdom has its special Commercial Flag, and since 1844 has a special ensign for its military marine, but both such ensigns are acknowledged by Foreign Nations as of identical International import. The Union of Norway and Sweden, if carefully examined, will be found to be a Federal Union based upon a compact between the Norwegian and Swedish Nations. It is classed however by Wheaton under the head of *personal* Unions, and Dr. Phillimore adopts the same order of classification, and cites Norway and Sweden by the side of Great Britain and Hanover, and by the side of Prussia and Neuchatel, as affording an example of a personal Union. Klüber, on the other

[6] Martens, N. R. II. p. 62.

[7] Acte dressé en commun par la Diéte de Norwège et la Diéte de Suède pour fixer les rapports constitutionels entre les deux Royaumes signé à Christiania le 31 Juillet et à Stockholm le 6 Août 1815. Martens, N. R. II. p. 608.

hand, and Heffter[7] class the Union of Norway and Sweden under the head of *Real* Unions. Klüber ranks it in the same category with the Union of Poland and Russia, which was recognised in Art. I. of the Final Act[8] of the Congress of Vienna, and with the Union of the two Sicilies under the Royal Proclamation of 12 Dec. 1816[9], in pursuance of a previous recognition of the Title of Ferdinard IV, as king of the Two Sicilies, in Art. CIV. of the Final Act. The true characteristic of a Personal Union seems to have been pointed out by Grotius, when he says, that upon the extinction of the reigning house the empire reverts separately to each people[10]. He might have added, that a like separation of the Kingdoms would ensue, if the succession to the respective Crowns should diverge to different members of the reigning House. Such was the result in the instance of Great Britain and Hanover, upon the death of King William IV, when the British Crown, by virtue of British Law, passed to the heir general, and the Hanoverian Crown, by virtue of Hanoverian Law, remained with the heir male of George III. Such a result however cannot arise in the case of Norway and Sweden, as there is an express provision in the Constitutional Act for maintaining the United Monarchy by the election of a new Common Dynasty, if the reigning Prince should at any time be without presumptive heirs, or if the two thrones should become actually vacant. It is apparent, therefore, that the Union of Sweden and Norway is very different from a *Personal* Union. On the other hand, it is not

7 Klüber, § 27. Heffter, § 26.
8 Martens, N. R. tom. II. p. 383.
9 Ibid. tom. IV. p. 275.
10 Grotius, L. I. c. 3. § 7. 2. Extincta domo regnatrice, imperium ad quemque populum seorsim revertitur.

identical with the *Real* Union which exists between the Independent States which compose a *Gesammstaat*, as Norway has not any International existence apart from Sweden, whereas the Independent States, which compose a Gesammstaat, enjoy both a separate and a common International existence.

Diversity of Federal Unions.

§ 41. The Union of Norway and Sweden is perhaps almost a solitary instance of a Federal Union under an hereditary Sovereign Prince. The United States of America and the Argentine[11] Confederation are instances of Federal Unions under an Elective President. In the former case, the President is elected for four years, and is immediately reeligible; in the latter case, he is elected for six years, and cannot be elected a second time until an intervening period of six years has elapsed. The Confederate States of America (anno 1861) are constituted after the model of the United States, with the exception that the President is elected for six years and is not reeligible. The Helvetic Confederation, on the other hand, under the Constitution of 1815[12], was an instance of a Federal Union under the direction of a Representative Council; under its present Constitution, which bears date 12 Sept, 1848, it ranks in the same class with the United States of America, but the President is elected for one year only, and is not reeligible until after an interval of one year[13]. Both the Argentine and the Swiss Confederations, although so styled, are strictly speaking Federal Unions equally with the United States of America and the kingdoms of Norway and Sweden. The Germanic Confederation, on the other hand, although it is an Independent System of States

[11] So called from the Rio de la Plata, which intersects it.

[12] Martens, N. R. IV. p. 173.

[13] Constitution Fédérale pour la Confédération Suisse, article 86. Fribourg en Suisse, 1856.

under the direction of a Representative Council, differs so essentially from all other Systems of identical import in the circumstance that several of the States of the Confederation enjoy a separate Nationality, notwithstanding that they participate in a common Germanic Nationality, that it may be regarded as a distinct Species, which deserves a separate category.

§ 42. A Confederation of four Colonies, under the title of the United Colonies of New England, (anno 1643,) was the first germ of Union amongst the British Settlements in North America. The subsequent war between Great Britain and France led to a more extensive Confederacy, (anno 1754,) which was to embrace all the then existing British Colonies from New Hampshire to Georgia; but it was at that time supposed that a Federal Union of the Colonies was impracticable. Subsequent disputes with the British government led to a more close association amongst thirteen Colonies, which ultimately declared themselves to be independent of the Mother Country, and agreed to certain "Articles of Confederation and perpetual Union" (15 Nov. 1777[14]). This Confederacy was directed in its external relations by a Congress composed of Delegates from each State, and by the ninth of the Articles, subsequently agreed upon at Philadelphia, on 9th July, 1778[15], it was provided, that the United States in Congress assembled should have the sole and exclusive right and power of determining on peace and war, except in cases[16] mentioned in the ninth article; of sending and receiving ambas-

The United States of America.

Articles of Confederation, 15 Nov. 1777.

[14] The American's Own Book, or the Constitutions of the several States in the Union, by J. R. Bigelow. New York, 1848.

[15] Ibid.

[16] Cases of emergency, where a State was actually invaded by enemies, or the danger of invasion was so imminent, as not to admit of delay, until the United States in Congress assembled could be consulted.

sadors; of entering into treaties and alliances; of establishing rules for deciding in all cases what captures on land or water should be legal; and of appointing Courts for the trial of piracies and felonies committed on the high seas. The Congress was thus charged with executive functions on behalf of all the United States in International matters, and upon the recognition of the Independence of the Confederation by Foreign Powers, the Congress took its place as a National Authority, and was acknowledged to be the representative of the United States of North America in their intercourse with other Nations.

Constitution of 1787.

§ 43. The Confederation of 1777 gave place to the more perfect Union of 1787[17], of which the distinguishing feature was the consolidation of the Executive Power in the hands of a President, who was to be chosen by electors appointed by each State. The Constitutional Act, agreed to in Congress on 28th Sept. 1787, and subsequently ratified by State-Conventions held in each of the thirteen States of the Union, declared that the object of the people of the United States is "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity." The Congress of the United States was henceforth to consist of a Senate and a House of Representatives, and it has power to provide, amongst other things, for the common defence and general welfare of the United States; to regulate commerce with Foreign Nations; to define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations; to declare war, grant letters of marque and reprisal, and make rules con-

[17] Martens, Recueil, T. iv. p. 288. The American's Own Book, p. 9.

cerning captures on land and water; to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the Laws of the Union; to suppress insurrections and repel invasions. The President, on the other hand, is the organ of the Union in its intercourse with Foreign Powers. He has authority to make treaties and to appoint Ambassadors and Consuls; and although he is bound on such occasions to take the advice and obtain the consent of the Senate, this is a regulation of domestic policy with which Foreign Nations are not concerned, as they can only communicate with the President. No State of the Union can enter into any treaty, alliance, or confederation, nor can any State without the consent of the Congress lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State of the Union or with a Foreign Power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay.

Articles of Confederation of 1778.

§ 44. It had been provided, by the Second of the Articles of Confederation of 1778, that each State was to retain its Sovereignty, Freedom, and Independence, and every power, jurisdiction, and right which was not expressly delegated to the United States in Congress assembled. With regard to the *Sovereignty* of each State, it is not within the scope of a treatise on the Law of Nations to examine in what respects and to what extent that Sovereignty has been controlled or modified by the subsequent Constitution of 1787; but with regard to the *Independence* of the several States it may be observed, that the exercise of all those functions which characterise an Independent State, has been delegated by the respective States to the Federal Government, and the National character

of each State is so far merged in the National character of the Union. Hence the Federal Government alone maintains international relations with Foreign Powers, and the Federal Union alone can acquire territory either by occupation or by cession, there being an express provision in the Constitution of the Union that new States may be admitted by Congress into the Union. The Federal Government has power to form and erect into a New State any territory which the Federal Union may acquire. Thus Louisiana was ceded by France to the United States under the Treaty of 1803, and the Floridas were similarly ceded by Spain in 1809; and the ceded territory in each case was formed into a new State, and admitted in that character into the Union. On the other hand, where an Independent State has joined the Union, a treaty has not been required as a condition precedent to its admission into the Union. Thus Texas had been recognised as an Independent State by the United States, as well as by other Foreign Powers, antecedently to 1844. In that year a Treaty, previously negotiated between Texas and the United States for the admission of Texas into the Union, did not receive the ratification of the American Senate, and it accordingly remained inoperative[17]. The Congress, however, resolved that the territory of Texas might be erected into a State with a Republican Form of Government, and thereupon be admitted as a new State into the Union, in accordance with the Third Section of the Fourth Article of the Constitution[18].

Cession of Louisiana and of the Floridas.

The Confederate States of 1861.

§ 45. On the 24 Dec. 1860, the State of South Carolina withdrew from the Federal Union on the

[17] Wheaton's Elements, Sixth Edition, p. 78.

[18] Under this article the Congress has power only limited by its discretion to admit as many New States into the Union as it may think proper, in whatever manner the territory comprising those New States may have been acquired.

ground that fourteen of the States of the Union had deliberately refused for many years past to fulfil their constitutional obligations under the Fourth Article[19] of the Constitution of the United States (anno 1787). The people of South Carolina thereupon by their Delegates in Convention assembled, issued a Declaration that the State of South Carolina "had resumed its position among the Nations of the world as a separate and Independent State, with full power to levy war, conclude peace, contract alliances, establish Commerce, and do all other acts and things which Independent States may of right do." Five other States followed almost immediately the example of South Carolina, and on the 8th February, 1861, a Convention of Delegates from the Seceding States assembled at Montgomery in the State of Alabama; and adopted a Federal Constitution, under the title of "the Constitution for the Provisional Government of the Confederate States of America." The Preamble is to this effect: "We the Deputies of the Sovereign Independent States of South Carolina, Georgia, Florida, Alabama, Mississippi and Louisiana, hereby, in behalf of the States, ordain and establish this Constitution for the Provisional Government of the same, to continue one year from the inauguration of the President, and until a permanent Constitution or Confederation be put into operation. Mr. Jefferson Davis of Mississippi was on the same day elected President, and Mr. A. H. Stephens of Georgia Vice-President of the Southern Confederacy. The President was inaugurated on the 18th Feb. 1861. The State of Texas had meanwhile elected Delegates to join the

[19] No person held to service or labour in one State under the Laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due. Article IV. s. 11. § 3.

Southern Congress; so that on the 4th March, 1861, when Mr. Lincoln was inaugurated at Washington in succession to Mr. Buchanan as President of the United States, a Southern Confederacy of Seven States, organized for international purposes almost after the model of the Federal Union, from which they had seceded, was assembled in Congress at Montgomery in the State of Alabama. A Constitution of the Confederate States has been since adopted, under which the Confederacy is empowered to acquire territory.

The Argentine Confederation.

§ 46. The Spanish Provinces on the banks of the Rio de la Plata, in South America, had previously to their separation from the Mother Country been under the Government of a Colonial Viceroy. Upon the successful issue of the Insurrection against Spain and the Proclamation of the Sovereignty of the Argentine People, the revolted Provinces constituted themselves a Republic, under the title of the Argentine Confederation. Discord and civil war subsequently broke out between Buenos Ayres and the other Provinces, and, after a contest of fourteen years' duration, a Federal Constitution was drawn up in May, 1853, to which thirteen of the Provinces adhered, whilst Buenos Ayres preferred to stand aloof, and to frame for herself a Constitution, as a separate State[20]. The existing Argentine Confederation therefore dates from the year 1853, when the Representatives of the People of the Confederation assembled in General Congress, decreed and established a Constitution, as recited in the Preamble, with a view to constitute a National Union amongst themselves, to consolidate internal peace, to provide for the common defence,

[20] By a Treaty signed Nov. 10, 1859, Buenos Ayres has declared herself to be once more an integral part of the Argentine Confederation. Provision had been made in the Constitution of 1853 for the admission of Buenos Ayres.

and to secure the liberty of all the inhabitants of the Argentine Soil. The thirteen Provinces, which composed at such time the Argentine State, are Cordova, Catamarca, Corrientes, Entre-Rios, Jujuy, Mendoza, Rioja, Salta, Santiago, San Juan, Santa Fé, San Luis, and Tucuman.

The Argentine Confederation a Single State decentralised.

§ 47. The Argentine Confederation has many features in common with the United States of North America; but it has remarkable features of difference, which are attributable to the fact, that the starting point of the Argentine Confederation was diametrically opposite to that of the United States of North America, the former Confederation resulting from the Decentralisation of a Single State[21], whilst the latter arose out of the Union of several States, which had been and might have continued to exist singly as Independent States. The Argentine Constitution, accordingly, in regard to the external relations of the Confederation, has only confirmed the original Unity of the Argentine State, at the same time that it has altogether decentralised its Internal Government, and has resolved it into a system of Confederate Provinces, which severally possess all the powers of Sovereignty which are not delegated by the Constitution to the Federal Government.[22] The National Unity, however, of the System, as regards Foreign Powers, is not thereby impaired, and the latter consequently can, under no pretext whatever, entertain direct International Relations with the Provinces without assail-

[21] We find accordingly that the Argentine Confederation is composed of Provinces and not of States, and that the object of the Confederation is declared to be, amongst other things, to provide for the common defence, and maintain the liberty of all persons who may be disposed to inhabit the Argentine soil, *la liberté pour tous les hommes du monde qui voudraient habiter le sol Argentin.* La Constitution de la Confédération Argentine. Bruxelles, 1856.

[22] Article 101. Les Provinces conservent tout le pouvoir non délégué par cette constitution au gouvernement fédéral.

ing the Nationality of the Argentine State, and violating the Independence of the Argentine Nation[23].

The Constitution of the Argentine State.

§ 48. The Executive Power of the Argentine Nation is vested in a President, who is entitled "The President of the Argentine Confederation," and the direction of the International Relations of the Confederation are vested in him conjointly with the Senate. He declares war and peace, nominates and recalls Ambassadors and Consuls, concludes and signs all treaties of peace, commerce, navigation, alliance, boundaries and neutrality, all Concordats and other Treaties which may be necessary to maintain friendly relations with Foreign Powers, whose Ministers he receives, and to whose Consuls he grants the Exequatur. The President exercises these latter functions subject to the approval of a Congress, which consists of two Chambers, one composed of "Deputies of the Nation," and the other of "Senators of the Provinces and of the Capital." The Chamber of Deputies consists of Representatives directly elected by the People of the Provinces and of the Capital, considered for this purpose as electoral districts of a single State, in the proportion of one deputy for every 20,000 inhabitants. Each deputy may sit for four years, and he is then reeligible, but half the members of the Chamber are renewed every two years. The Senate is composed of two Senators from each Province and two from the Capital; each Senator may sit for nine years, and is immediately reeligible, but a third of the Senate is renewed every three years. The approval of the Congress, which is required by the Constitution to give perfect validity to the acts of the President, is an

[23] The Provinces may conclude mutual Conventions with one another upon matters of Police, Public Works, and the Administration of Justice, subject to the sanction of the Federal Congress.

arrangement of domestic policy, analogous to the arrangements under which the approval of the British Parliament is required by the Constitution to enable the Crown to give effect to *treaties of commerce* concluded with Foreign Powers.

The Argentine Provinces.

§ 49. The Provinces which compose the Argentine State are expressly prohibited by the Constitution from exercising any of the powers which are delegated to the Confederation. They may not conclude any treaties of a political character, or pass any laws affecting commerce or navigation, or establish any Custom Houses, or levy any troops, or arm any ships of war, except on occasions of sudden invasion when delay is inadmissible, and in which case they must make an immediate report to the Federal Government; nor may they nominate abroad, or receive at home, Foreign Agents. The Provincial Institutions are cast in a Republican mould, and each Province elects its own Governor, but the Governors of the Provinces upon their election become not merely local Functionaries, but are the constituted Agents of the Federal Government in enforcing the Laws of the Confederation. No Province is allowed by the Constitution to declare or make war upon another Province, and a Supreme Court of Justice, modelled after that of the North American Union, has authority to hear and redress all matters and complaints between Province and Province.

The Swiss Confederation of 1648.

§ 50. The Swiss Confederation, in the earliest form in which its Independence was recognised by a Public Act of the European Powers (anno 1648), consisted of thirteen Cantons, Glaris, Schwytz, Uri, Zug, Unterwald, and Appenzell, the political Constitutions of which were democratic, and Bâle, Fribourg, Berne, Lucerne, Zurich, Schaffhouse and Soleure, which had

Constitutions more or less aristocratic. The Confederation underwent various vicissitudes during the wars of the French Revolution of 1789, and six other Cantons, some of them being districts which had separated from existing Cantons, were received into the Confederation, namely, St. Gall, Grisons, Argovie, Thurgovie, Tessin and Vaud. In 1803, Napoleon, then First Consul, imposed upon the Confederation, in the character of Mediator between the partisans of a Central State and those of a Federal State, a new Constitution, under the title of an "Act of Mediation," which intrusted the interests of the Confederation to a Federal Diet, which was to meet at Fribourg, Berne, Soleure, Bâle, Zurich or Lucerne, year by year, and in each year the Burgomaster of the directing Canton was to be the Landammann of Switzerland, charged with the Presidence of the Diet and with all communications with Foreign Powers. The Act of Mediation was superseded in 1814 by an alliance of a Federal Character between the nineteen Cantons[24], and in the following year three new Cantons, Neuchatel, Geneva, and Valais, were admitted into the Confederation, so that the new Act of Confederation, concluded 7th August, 1815, embraced twenty-two Cantons[25]. It was this new Confederation, which acceded formally to the territorial arrangements of the Congress of Vienna on 12 August, 1815; and, in consideration of its accession, the perpetual neutrality of Switzerland and the inviolability of its soil was recognised and guaranteed by the Powers, which signed the Final Act of the Congress.

The Helvetic Confederation of 1815.

§ 51. The Helvetic Confederation of 1815 was an Union of a closer kind than the early Federal Pact, which had preceded the Constitution under the Act

[24] Martens, N. R. II. p. 68. [25] Martens, N. R. IV. p. 173.

of Mediation. Its object was declared to be the preservation of the freedom, independence and security against foreign assault and of the domestic order and tranquillity of the twenty-two Cantons. The Cantons guaranteed reciprocally to one another their respective political Constitutions and their territorial Possessions. The Confederation had a common army, composed of contingents of men from each Canton, and a common military chest, supplied by duties levied on the importation of foreign merchandise, and collected by the frontier Cantons. The Diet consisted of one deputy from each Canton voting according to instructions, and it assembled at Berne, Zurich, or Lucerne alternately. The direction of the affairs of the Confederation, when the Diet was not in session, was confided to the Canton in which it ought to assemble, and the duties of Directing Canton (Vorort) accordingly devolved every alternate two years upon the Protestant Canton of Zurich and the Roman Catholic Cantons of Berne and Lucerne. All the functions which had belonged to the Directing Authority of the Confederation before 1798, were, under the new Constitution, continued to the Directing Canton. The Diet had the prerogative of declaring war and concluding treaties of peace, alliance, and commerce with Foreign States. It provided for the internal and external security of the Confederation, directed the operations and appointed the Commanders of the Federal Army, and nominated the Ministers accredited to Foreign Powers. In case of internal or external danger, each Canton had the right of demanding the aid of the other Cantons, in which case notice was to be given immediately to the Directing Canton, in order that the Diet might be called together to provide the necessary measures of security. Under the Federal Compact prior to 1798,

The Vorort or Directing Canton.

the Cantons might make separate treaties with one another or with Foreign Powers. Under the Confederation of 1815, the individual Cantons were precluded from concluding any alliance which might be prejudicial (nachtheilige) to the General Confederation, or to the right of the other Cantons.

The League of Sarnen.

§ 52. The French Revolution of 1830 led to various changes in the Internal Constitutions of the different Cantons, and a plan for the revision of the Federal Pact of 1815 was drawn up by a Committee of the Diet in 1832. The object of the revision was mainly to assign to the Federal Authorities more of the attributes of a Central Government than they had hitherto possessed; but the scheme was vigorously opposed by Seven Cantons, namely, Schwytz, Uri, Unterwald, Bâle, Tessin, Neuchatel and Valais. These Cantons united themselves together in a separate Confederation, called *the League of Sarnen.* The Diet of 1833 took the necessary measures for dissolving the League of Sarnen, and for compelling the seceding Cantons to send Deputies to the National Diet. The question of the revision of the Federal Pact was renewed in 1834, but unsuccessfully. In 1846 a separate armed League of the Seven Catholic Cantons was formed, under the title of *Sonderbund,* which was in fact an armed Confederation within the Confederation. This association being at variance with the Sixth Article of the Federal Pact, it was resolved by the Diet that it should be put down by force of arms, which was accordingly effected. The eventful political changes, which convulsed Europe in 1848, contributed to bring about a change in that year in the Constitution of the Confederation, whereby it more nearly approximates at present to the model of the Federal Union of the North American States.

The Sonderbund.

§ 53. The existing Constitution of the Swiss Confederation was voted by the Diet, on 12th September, 1848. The Confederation consists, as under the settlement of 1815, of twenty-two Cantons; but of these Bâle is divided into Bâle-town and Bâle-country; Underwalden into Upper and Lower Underwalden; and Appenzell into Outer and Inner Rhodes. The object of the Confederation is declared to be to secure the Independence of the Country (la patrie) against foreign assault, to maintain tranquillity and order in the Interior; to protect the liberty and rights of the Confederates; and to promote their common prosperity. The Cantons are respectively Sovereign in all matters in which their Sovereignty has not been delegated to the Federal Power. The Cantons are forbidden to enter into any private alliance or any treaty of a political character with one another, but they may conclude with one another Conventions upon matters of Legislation, Administration, and Justice, subject to the approval of the Federal Authority. The Confederation alone has the right of declaring war and concluding peace, as well as of making alliances and treaties with Foreign Powers, and more especially treaties of commerce, and of regulating the custom-duties on foreign imports. The Cantons retain the right of concluding with Foreign States conventions on matters of Political Economy and relations of Neighbourhood and Police; but these conventions must contain nothing prejudicial to the Confederation, or to the rights of the Cantons, and all official relations between the Cantons and Foreign Governments are carried on through the medium of the Federal Council. The Confederation has also power to expel from its territory strangers who compromise either the Internal or the External security of Switzerland. The

The Swiss Confederation of 1848.

The Federal Assembly.

Federal Authorities consist of a Federal Council and a Federal Assembly; the latter consisting of two Sections or Councils, a National Council, and a Council of States. The National Council is composed of Deputies of the Swiss People, in the proportion of one Deputy for every 20,000 citizens, and every natural born Swiss of the age of twenty years complete, unless under some legal disability, has a right to vote for members of the National Council; and, if a layman, is eligible as a Deputy. The National Council is elected for three years, and the whole body is renewable at each election. The Council of States, on the other hand, is composed of forty-four Deputies of Cantons, two Deputies being nominated by each Canton; and in the case of the divided Cantons, one Deputy is nominated by each Half-Canton. Each Council chooses for each Session a President and a Vice-President from its own body. These officers are not reeligible. One of the most important functions of the Federal Assembly is to select the Federal Council, which is the Supreme Executive body, and the directing authority of the Confederation. For this purpose the two Councils meet in one body, and elect seven persons, who must be Swiss Citizens, qualified to be members of the National Council, and who upon their election become members of the Federal Council for three years, and during such time are precluded from any other employment. The Federal Council must be renewed entirely upon each renewal of the National Council. The President of the Federal Council is the President of the Confederation, and he is selected, as well as the Vice-President of the Federal Council, from amongst the seven members of the Federal Council by the National Assembly. The President of the Confede-

The Federal Council.

ration holds office for one year, and is not reeligible. Four members must be present to enable the Federal Council to deliberate. The Federal Council nominates to Foreign Missions, examines all treaties concluded either amongst the Cantons or with Foreign States, and approves them, if it thinks fit. It watches over the interests of the Confederation abroad, and more particularly over its International relations; and is in general charged with the superintendence of the external relations of the Confederation, and with the maintenance of its Independence and its Neutrality.

Analogy between the Swiss Confederation and the United States of America.

§ 54. It will be seen that the existing Constitution of the Swiss Confederation bears a very close resemblance to the Federal Union of the North American States, and to the Federal Union of the Argentine Provinces. Each of these Confederations is for all International purposes a single Independent State. Each of them is only known to Foreign Powers through the medium of the Supreme Federal Government, which for all external purposes represents the Nationality of the entire Federal Body. A Federation of this kind is essentially a very different body from what is ordinarily understood by a Confederation of States. Heffter[25] accordingly, and other German Jurists, have employed the term *Bundesstaat*, or Federative State, to denote an Union of States, which is formed on a basis of equal rights, and rests upon a compact of Public Law (fœdus), under which the individual States are merged for all International purposes in the Union. The term Confederation of States, (*Staaten-Bund*,) according to these writers, is properly applicable to an association of Independent States, each member whereof severally retains its

Bundesstaat or Federative State.

Staaten Bund, or Confederation of States.

[25] Heffter, § 20.

own Nationality, whilst it participates at the same time in the common Nationality of the Confederation. The Germanic Confederation is an association of this latter character. It is composed of Independent States, which have substituted for their ordinary rights and duties in relation to one another under the Law of Nations, special rights and duties under the Articles of Confederation. They at the same time *severally* retain, in regard to non-Germanic Powers, all their rights and duties under the Law of Nations; whilst they have *collectively* acquired in relation to those Powers special rights and duties, as a Community of States, by virtue of the International recognition of the Articles of Confederation. Thus the Germanic Confederation was acknowledged by the representatives of the European Powers, at the Congress of Vienna, to have the right in its Collective capacity of making war and peace, of sending and receiving Embassies, and of forming alliances and treaties within the scope of its institution; which is declared by the Articles of Confederation to be the maintenance of the Independence of the individual States, and the inviolability of their territory. The Confederation is in fact an association in the nature of a permanent League of Independent States, differing so far from an ordinary League, that it is clothed with a common National character for certain purposes, and its Right of common action within a certain sphere of International rights and obligations forms part of the Conventional Law of Europe.

Origin of the Germanic Confederation.

§ 55. The origin of so anomalous a body as the Germanic Confederation is traceable to a political necessity. In consequence of the creation of the Confederation of the Rhine under the protection of the Emperor Napoleon, and the subsequent abdication of

the Crown of the Roman Empire of the Germans by the Emperor Francis[26], (August 6,1806,) not only the substance but the name of a Germanic Political Body had disappeared. It became, however, necessary after the successful conclusion of the War of Liberation, to create another Germanic Political Body, partly to satisfy the deep-seated feeling of Nationality amongst the People of the Germanic States; partly to fill up the void which the disappearance of the Germanic Empire had caused in the centre of the European Political System. It was impossible to revive the ancient Empire without the sacrifice of the Sovereign rights, which the former Vassals of the Emperor and the Empire had enjoyed since the Dissolution of the Empire in 1806, and it was neither reasonable to demand nor practicable to enforce such a sacrifice. The Emperor Francis accordingly repudiated the advice of those who urged him to resume, as a matter of course, the Crown of the Roman Empire of the Germanic Nation. Others spoke in favour of a new Germanic Empire to be fashioned according to the requirements of the times. The majority of the German Princes, who had been admitted to the full enjoyment of Sovereign rights, were in favour of a simple political alliance amongst all the Sovereign Germanic States. The Emperor Francis rejected the idea of a new Germanic Empire, as it would have had the support only of political enthusiasts, and would have been opposed by the German Princes and the loyal portion of their subjects. On the other hand, a mere alliance between the Sovereign States of Germany did not offer in the opinion of the Imperial Cabinet sufficient guarantees for maintaining the tranquillity of Germany, and might even prove to be a measure in its results antagonistic

[26] Martens, Recueil, T. viii. p. 407.

to that object. The Emperor Francis accordingly insisted on a Confederation of States, which would be compatible with the independence of the Sovereign Princes and States of Germany, and would at the same time secure the integrity of the Germanic territory. The acquiescence of Russia, Prussia, and Great Britain in this scheme was made a *conditio sine quâ non* of Austria's accession to the Quadruple Alliance in 1813. The Sixth Article of the Treaty of Peace concluded at Paris between the Four Allied Powers and France (30 May, 1814) put the seal to the settlement of the previous year. "Les Etats de l'Allemagne seront independans et unis par un lien fédératif."[27] The Sovereign Princes and Free Cities of Germany in accordance with this stipulation empowered their Representatives to draw up certain Articles in the form of an Act of Federation, which was subsequently embodied in the Principal Act of the Congress of Vienna; and thus the German Federal Act became a recognised part of the Public Conventional Law of Europe.

The Federal Act of 1815.

§ 56. There was a provision in the Federal Act, that the Diet should draw up as soon as possible a body of Fundamental Laws for the Confederation, and should settle its Organic institutions in regard to its external, military, and internal relations. We find accordingly a series of Ministerial Conferences holden at Vienna for the purpose of completing and consolidating the Organisation of the Confederation, and the result of these Conferences was embodied in a Final Act, (Schluss-Act,) which received the signature of the Representatives of all the Sovereign Princes and Free Cities of Germany at Vienna, (15 May, 1820,) and which was subsequently ap-

[27] Martens, N. R. II. p. 6.

proved by the Diet at Frankfort, (8 June, 1850,) and by an unanimous Resolution converted into a Fundamental Law of the Confederation, having the same force and validity as the Federal Act itself. It is therefore in the Final Act[28], that we find the Constitution of the Germanic Confederation developed and completed in its various details, pursuant to the Provisions of Article X of the Federal Act, which was textually inserted as Article LXII in the Principal Act[29] of the Congress of Vienna.

The Federal Act defines the object of the Confederation in Article II to be the maintenance of the external and internal security of Germany, and of the independence and inviolability of the Confederated States. The States of the Confederation bind themselves by Article XI to defend not only Germany in its entirety, but also each Individual State of the Union in case it should be attacked, and they mutually guarantee to one another all such their possessions as are comprised within the Union. When war is declared by the Confederation, no member can carry on private negotiation with the enemy, nor make a peace or an armistice without the consent of the others. The Members of the Confederation in reserving to themselves the right of forming alliances, oblige themselves not to contract any engagement which shall be prejudicial to the security of the Confederation, or of the Individual States which compose it. The Confederate States undertake not to make war against one another on any pretext whatever, but to refer all their disputes to the Diet for its Mediation.

§ 57. The *Final Act*, which consists of Sixty-five Articles, developes more fully and explicitly the Fundamental Dispositions of the Federal Act in regard

Final Act of 1820

[28] Martens, N. R. V. p. 466. [29] Ibid. N. R. II. p. 409.

to the external relations of the Confederation in Sixteen Articles, consecutively from the Thirty-fifth to the Fiftieth inclusively. It is declared in Article XXXV, that the Confederation has the right, as a Collective Power, to declare war, make peace, and contract alliances and negotiate treaties with due regard to the objects of its Institution, as announced in Article L of the Federal Act, namely, its own defence, the maintenance of the inviolability and external security of Germany, and of the independence and inviolability of each of the States of the Confederation. Article XXXVI declares that any damage caused to any Confederate State by a Foreign Power is a damage to the whole Confederation by virtue of the reciprocal guaranty of the integrity of their possessions, and on the other hand, the Confederated States undertake to refrain from giving any provocation to Foreign Powers. In case a Foreign Power should make complaint against a State, the Diet is empowered to require the State, if it is in the wrong, to make redress to the Foreign Power. Article XXXVII provides, that the Diet may examine into the origin of any differences which may arise between any State of the Confederation and a Foreign Power, and either refuse its aid if the State is in the wrong, or if the State is in the right, employ its good offices in its behalf. Article XXXVIII provides, that if there is reason to apprehend danger to any State of the Confederation, or to the whole body, the Diet shall immediately adopt the necessary measures of defence. Article XXXIX provides, that if the Territory of any State of the Confederation is invaded, the fact of such invasion constitutes a state of war for the whole Confederation, and the necessary measures of defence must be at once adopted. Article XL provides, that if it

be necessary for the Confederation to make a formal Declaration of war, the General Assembly on its behalf shall make such Declaration, if a majority of two-thirds so decide. By Article XLI, a Resolution of the Diet, that there is real danger of an hostile attack, or a formal Declaration of War on the part of the General Assembly, constitutes all the Confederated States active parties in the war. Article XLII provides, that if the Diet should decide in the negative against there being any real danger of an hostile attack, the States which do not share the opinion of the majority of the Diet may concert among themselves measures of common defence. Article XLIII provides, that the Diet may mediate, if requested, between a Foreign Power and any Confederated State, which considers itself to be in particular danger of a foreign attack, if both the disputing parties consent to its mediation. Article XLIV provides, that every State, when war has been declared, may furnish any number of troops above its contingent at its own expense. By Article XLV, the Diet is empowered to take the necessary steps to maintain the neutrality of the territory of the Confederation, if it should be threatened in a war between Foreign Powers, or otherwise. Article XLVI provides, that if a Confederated State, having possessions beyond the limits of the Confederation, undertakes a war, as an European Power, the Confederation remains a stranger to such war. Article XLVII is a very important Article, as the protection of the Confederation is thereby extended to territory beyond its own limits. It provides, that in case any State is menaced or attacked in its possessions not comprised within the Confederation, the Confederation is not to adopt any measures of defence, nor to take an active part in the war, until the

Diet shall have recognised in its Permanent Council by a majority of voices the existence of danger to the Territory of the Confederation, in which case all the dispositions of the previous Articles equally apply. Article XLVIII provides, that the dispositions of the Federal Act which precludes every State, after war has been declared by the Confederation, from holding any private negotiations or making a separate peace or armistice, shall apply equally to all States, whether they possess or not territory beyond the limits of the Confederation. Article XLIX provides, that when peace is to be made, a Committee of the Diet shall direct the negotiations, and Plenipotentiaries from the Diet shall conduct them. The ratification of all treaties of peace shall only be pronounced by the General Assembly. Such is the organisation of this remarkable National League for the security and defence of the Germanic soil from foreign attack.

The International Functions of the Diet.

The Ordinary Functions of the Diet in regard to Foreign Relations of Peace are regulated by Article L. It is authorized as the organ of the Confederation to watch over the maintenance of peace and friendly relations with Foreign Powers. 2. To receive the Envoys of Foreign Powers, who may be accredited to the Confederation, and to nominate Envoys to Foreign States, if it is judged necessary. 3. To conduct negotiations and to conclude treaties on behalf of the Confederation. 4. To employ its good offices with Foreign Powers on behalf of any of the Members of the Confederation who may claim them, and to employ them also with the States of the Confederation, if Foreign Governments should request their intervention.

Diplomatic Relations.

In accordance with the second provision of the above Article, Diplomatic Relations between the Confederation, in its character of an European Power, and

the Non-Germanic Powers of Europe, have been habitually maintained by permanent Missions accredited by the latter Powers to the Germanic Confederation at Frankfort, but the Diet has not judged it necessary to accredit Resident Envoys on behalf of the Confederation to any Foreign Powers. It is only on extraordinary occasions, as in the case of negotiations which have affected the interests of the Confederation, as a Federal System of States, that the Diet has appointed Plenipotentiaries to treat with Foreign Powers[30]. The respective States of the Confederation meanwhile both accredit and receive Resident Plenipotentiaries, to superintend their separate International Relations with Non-Germanic Powers.

The Ordinary Assembly of the Diet.

§ 58. It is not within the scope of the present treatise to examine at any length the Internal Constitution of the Germanic Confederation, further than as regards the Executive Power, of which Foreign States must necessarily take cognizance. The affairs of the Confederation, as a Federal System of States, are intrusted to a Federative Diet, which sits at Frankfort on the Maine, and in which each State is represented by a Minister Plenipotentiary. This Diet bears no resemblance except in name to the Diet of the Ancient Empire, which consisted of three Colleges, each independent of the other, and the Decrees of which required the assent of the Emperor to give them validity. Whereas this Federative Diet is a collective Sovereign Assembly, which exercises its functions

30 Thus the Plenipotentiaries of Austria and of Prussia respectively were constituted Plenipotentiaries of the Diet of the Germanic Confederation, and in that character acceded on behalf of the Confederation to the Treaty of London, (19 April, 1839,) whereby certain portions of the Grand Duchy of Luxemburg (Germanic Soil) were ceded to Belgium in exchange for portions of the Province of Limburg. Martens, Nouveau Récueil, XVI. p. 791.

in absolute independence of any Superior Political Authority. The Plenipotentiaries of the States, who are bound by their instructions and cannot act without them, vote in the Diet under different conditions, according as they are convened in the Ordinary Assembly of the Diet, or in the General Assembly. When the Plenipotentiaries meet in the Ordinary Assembly, or Permanent Council, eleven of them exercise respectively an individual vote, but the remainder vote in six separate groups, two or more States, as the case may be, having the right of giving only a single vote collectively. The votes are thus arranged without prejudice to the rank of the Members :—

1.	Austria	1
2.	Prussia	1
3.	Bavaria	1
4.	Saxony	1
5.	Hanover	1
6.	Würtemburg	1
7.	Baden	1
8.	Electoral Hesse	1
9.	Grand Ducal Hesse	1
10.	Denmark (for Holstein)	1
11.	Netherlands (for Luxemburg)	1
12.	Grand-Ducal and Ducal Houses of Saxony	1
13.	Brunswick and Nassau	1
14.	Mecklenburg Schwerin and Mecklenburg Strelitz	1
15.	Holstein-Oldenburg, Anhalt and Schwarzburg	1
16.	Hohenzollern, Liechtenstein, Reuss, Schaumburg-Lippe, Lippe (Detmold) and Waldeck	1
17.	The Free Cities of Lübeck, Frankfort, Bremen and Hamburg	1
	Total	17 Votes.

Hesse-Homburg was not admitted into the Confederation until 7 July, 1817[31], when it was allowed to share the collective vote of Hohenzollern and its co-ordinate States. The Plenipotentiary of Austria is entitled to preside in the Diet. Each State of the Confederation has the right to propose any measure for consideration, and the President is bound within a given time to bring it before the Diet. Such is the Constitution of the Diet in what is termed the Ordinary Assembly or Close Council.

Admission of Hesse-Homburg, 7 July, 1817.

§ 59. The Diet forms itself into a General Assembly termed the *Plenum*, or Full Chapter, whenever it is necessary to decide upon questions touching the enactment or the modification of Fundamental Laws, or the adoption of measures affecting the Federal Act itself, or the Organic institutions and other arrangements of common interest to the States of the Confederation. In this Assembly every State has a separate voice, the larger States being allowed a greater number of votes in the following proportions :—

The Plenum or Full Chapter of the Diet.

1. Austria	4
2. Prussia	4
3. Saxony	4
4. Bavaria	4
5. Hanover	4
6. Würtemburg	4
7. Baden	3
8. Electoral Hesse	3
9. Grand Ducal Hesse	3
10. Holstein and Lauenburg	3
11. Luxemburg	3
12. Brunswick	2
13. Mecklenburg-Schwerin	2
14. Nassau	2
15. Saxe-Weimar	1

[31] Meyer, Staats-Acten des Deutschen Bundes, Tom. II. p. 71.

16. Saxe-Gotha	1
17. Saxe-Coburg	1
18. Saxe-Meiningen	1
19. Saxe-Altenburg[32]	1
20. Mecklenburg-Strelitz	1
21. Holstein-Oldenburg	1
22. Anhalt-Dessau	1
23. Anhalt-Bernburg	1
24. Anhalt-Köthen	1
25. Schwarzburg-Sondershausen	1
26. Schwarzburg-Rodolstadt	1
27. Hohenzollern-Hechengen	1
28. Liechtenstein	1
29. Hohenzollern-Siegmaringen	1
30. Waldeck	1
31. Reuss (elder branch)	1
32. Reuss (younger branch)	1
33. Schaumburg-Lippe	1
34. Lippe-Detmold	1
35. Lübeck	1
36. Frankfort	1
37. Bremen	1
38. Hamburg	1
Total	69 Votes.

Upon the admission of Hesse-Homburg into the Confederation, (7 July, 1817,) that State became entitled to a single vote in the Full Chapter; so that there are at present seventy voices in the General Assembly. The Diet, in its Ordinary Assembly, has the right of deciding by a majority of votes, whether any question shall be submitted to the votes of the General Assembly. The Ordinary Assembly has the right of full discussion, and prepares the resolutions to be submitted in the General Assembly, which has no right of discussion; but simply exer-

[32] Formerly Saxe-Hildburghausen.

cises a right of approval or disapproval by a majority of two-thirds of all its votes. The Diet sits permanently, but it has a power of adjourning itself, after it has completed its deliberations on any subject, for a period not longer than four months. It will be seen, that as forty-seven votes are required in the General Assembly to constitute a majority of two-thirds, an affirmative decision of the General Assembly implies a greater amount of common agreement amongst the Confederated States than an affirmative decision of the Ordinary Assembly, and that when a combination of the more powerful States may have succeeded in carrying a measure in the Ordinary Assembly, a combination of the less powerful States may be enabled to reject it in the General Assembly. Such was the original conception of the General Assembly in the Federal Act, by the Sixth and Seventh Articles of which it had been provided, that two-thirds of the votes of the Full Chapter should constitute a majority in respect of such matters of common interest as come within its province. It was, however, subsequently provided by the Fourteenth Article of the Final Act, that in regard to Organic institutions, whereby are meant permanent arrangements, serving as means of executing the objects directly connected with the acknowledged end of the Confederation, the General Assembly must be unanimous in assenting not merely to the preliminary question, whether they shall allow any measure at all under the circumstances to be laid before them, but also in approving the principle and the essential arrangements of any plan which may be proposed. If the General Assembly should decide in favour of the project submitted to them, the details of its execution are to be referred to the Permanent Council,

A Majority of Two-Thirds.

Unanimity of the Diet.

which is to decide all questions which may arise as to those details by an absolute majority of votes, with power to appoint a Committee to reconcile divergent opinions.

Permanent character of the Germanic Confederation.

§ 60. By Article XI of the Federal Act, the States of the Confederation have mutually guaranteed to one another all such portions of their Possessions as were comprised within the Confederation. By Article V of the Final Act, no State is at liberty to detach itself from the Confederation; and by Article VI no new member can be admitted into the Confederation, without the unanimous assent of all the Confederated States. No change which may take place in the state of the Possessions of the members of the Confederation can affect their rights and engagements in reference to the Confederation without the consent of the Confederation. No State can voluntarily cede its rights of Sovereignty over any portion of its territory within the Confederation to any non-Confederate Power without the consent of the Confederation. The National Unity of the Confederation, in regard to all matters affecting its territory, is thus complete. We find, accordingly, that upon the signature of the definitive Treaty of London[32], (19 April, 1839,) whereby the King of Holland ceded to the King of the Belgians a portion of the Grand Duchy of Luxemburg in exchange for a portion of the province of Limburg, not merely was the recognition of the Five Great Powers formally granted to the dissolution of the political Union, which existed between Holland and Belgium, in pursuance of the Treaty of Vienna, of 31 May, 1815; but the Germanic Confederation by its Plenipotentiaries, formally acceded to the territorial arrange-

Treaty of London, 19 April, 1839.

33 Martens, Nouveau Supplément, T. XVI. p. 791.

ments, which had been concluded between the Five Great Powers, on the one hand, and Holland and Belgium on the other hand; and under which the King of Holland, as Grand Duke of Luxemburg, had ceded to the King of the Belgians a portion of the Grand Duchy of Luxemburg within the territory of the Confederation, in consideration of a territorial Indemnity within the Province of Limburg. The Confederation having thus acceded, in its character of an European Power, to the International readjustment of a portion of its territory, it remained for the Diet to order Constitutionally, according to the provisions of the Final Act, such arrangements as might be necessary between the Confederation and the Grand Duke of Luxemburg, as one of its members, consequent on the altered circumstances of the Grand Duchy.

The cession of territory by a State within the Union to a Power which was not a Member of the Union was an International matter, not merely as between the State which ceded its territory and the Power to which such territory was ceded, but as between the Germanic Confederation and the Non-Confederate Power, whereas all subsequent arrangements between the Germanic Confederation and the Confederate State, consequent on the cession of its territory, were matters to be regulated not by the Public Law of Nations, but by the Constitutional Law of the Confederation.

CHAPTER IV.

THE OTTOMAN EMPIRE.

International Relations of the Mahommedan World—Admission of the Porte into the Fellowship of European Nations—Treaty of Paris, 30 March, 1856—Declaration of Maritime Law—Constitution of the Ottoman Empire—Christian and Mahommedan Dependencies—Exceptional Position of Tunis—The States on the Barbary Coast—Treaties with Algiers—Early Treaties with the Sublime Porte—The Barbary States in practice Hereditary Regencies—Paschalik of Egypt—Treaty of London, 15 July, 1840—Principality of Servia—Treaties of Sistova, Bucharest, Adrianople and Ackerman—The Principalities of Walachia and of Moldavia—Treaties of Carlovitz, Kutschauk-Kainardji, Bucharest, Adrianople, St. Petersburg—Convention of Balta Liman—Treaty of Paris—The Danube and the Dardanelles—Neutralisation of the Black Sea—The Principality of Montenegro—Treaties of Carlowitz, Passarovitz, Sistova—Congress of Paris.

International Relations of the Mahommedan World.

§ 61. THE International Relations of the Ottoman Porte with the Christian Powers of Europe have undergone a remarkable change and received an extraordinary development during the last preceding thirty years. At the commencement of the present century, it would not have been incorrect to have described those Relations as resting solely on compact. Such, indeed, was the view adopted by Lord Stowell in 1804, when he was called upon to administer the Public Law of Europe in matters wherein the interests of Ottoman Subjects were concerned, "The Inhabitants of the Ottoman Empire," he observes[1], "are not possessors of exactly the same Law of Nations with ourselves. In consideration of the peculiarities of their situation and character, the Court has repeatedly expressed its disposition not to hold them bound to the utmost rigour of that system of Public Law, on which European States have so long acted in their intercourse

[1] The Madonna del Burso, 4 c. Robinson's Admiralty Reports, p. 172.

with one another." The same distinguished Jurist, on another occasion[2] when the acts of an established Mahommedan Government were impugned, observed that "although their notions of justice to be observed amongst Nations differ from those which we entertain, we do not on that account venture to call in question their Public Acts. As to the mode of confiscation, which may have taken place on this vessel, whether by formal sentence or not, we must presume it was done regularly in their way, and according to the *Established Custom* of that part of the world. There might perhaps be cause of capture, according to their notions, for some infringement of the Regulations of Treaty, as it is by the Law of Treaty only that these Nations hold themselves bound, conceiving (as some other people have foolishly imagined) that there is no other Law of Nations but that which is derived from positive compact and convention. Law of Treaty.

Wheaton has adopted an identical view of the International Relations of the Mahommedan world. "The European Law of Nations," he writes[3], "is mainly founded upon that community of origin, manners, institutions, and religion, which distinguishes the Christian Nations from those of the Mahommedan world. In respect to the mutual intercourse between the Christian and the Mahommedan Powers, the former have been sometimes content to take the Law from the Mahommedan, and in others to modify the International Law of Christendom in its application to them. Instances of the first may be found in the cases of the ransom of prisoners, the rights of ambassadors, and many others where the milder usages established amongst Christian Nations have not yet

[2] The Helena, 4 c. Robinson's Admiralty Reports, p. 6.

[3] History of the Law of Nations. Part IV. § 21.

been adopted by the Mahommedan Powers. On some other points they are considered as entitled to a very relaxed application of the peculiar principles established by long usage amongst the States of Europe, holding an intimate and constant intercourse with one another."

Admission of the Porte into the Fellowship of European Nations.

§ 62. Such may have been a correct picture of the exceptional position which the Ottoman Porte occupied amongst the Powers of Europe during the early part of the reign of the Emperor Mahommed II. (1808—39). The Ottoman Empire was accordingly not represented by any Minister in the Congress of Vienna (anno 1815), nor was it included in the system of Public Law recognised by the Powers there assembled. But since the destruction of the Janissaries (17 June, 1826) the Ottoman Porte has steadily advanced in its practice towards the European platform of Public Law. It has not, it is true, made any formal communication to the European Powers on the subject; but it may be considered to have substantially pledged itself to the acceptance of the International Law of Europe by subscribing, as one of the Parties to the General Treaty of Paris, (30 March, 1856[4],) the clause of the Seventh Article, whereby the Sublime Porte is declared "to be admitted to a participation in the advantages of the Public Law of Europe and the System of Concert attached to it," since it is a cardinal principle of that System, that the rights and obligations of Nations are reciprocal. The Porte appears on that occasion not only to have acquiesced in the declaration of its admission into the European Family of Nations, but to have joined in applying to itself the principle involved in that declaration, as may be clearly deduced from the Fifteenth

Treaty of Paris, 30 March, 1856.

4 Martens, N. R. Gén. XV. p. 770.

and Sixteenth Articles of the Treaty, whereby the Provisions of the Final Act of the Congress of Vienna concerning the navigation of rivers, which separate or traverse several States, are made applicable to the Danube and its mouths, and which disposition is declared to form part of the Public Law of Europe, and to be under the guaranty of all the Contracting Powers. The Porte had already abandoned its own traditions with regard to the precedence and reception of Foreign Ambassadors, and had in practice conformed itself to the rules established amongst the European Powers in regard to an uniform mode of reception, and an uniform scale of rank and precedence for Ambassadors and other Diplomatic Agents: it had already appealed in its negotiations with various Christian Powers, as for instance in the case of Greece in 1854, to International Rights and the Law of Nations as something independent of mere Compact, and upon which it took its stand in common with the Powers of Europe; it has further by subscribing the Declaration of Maritime Law at Paris, (16 April, 1856,) subsequently to its signature of the General Treaty, formally placed on record its assent to the milder practice, which the European Nations have agreed henceforth to adopt, in regard to the respective rights and duties of *Belligerent* and *Neutral* Powers.

Declaration of Maritime Law, 16 April, 1856.

It would thus appear, that the Ottoman Porte has for all practical purposes adopted the Common Law of Europe, as the rule of its intercourse with Non-Mahommedan Powers in matters not specially provided for by Treaty-engagements. Its International Relations under Treaty-engagements are and will probably continue to be extremely anomalous, owing to the broad line of demarcation which separates the manners and institutions of the Mahommedan world from those of Christendom. Some of these

Treaty-engagements are strictly of a political character, establishing special obligations between Christian States and Individual Governments of the Ottoman Empire; others have in view the regulation and security of commercial intercourse between Ottoman and Christian Merchants, and are in form Capitulations between the Porte and Individual Christian Powers, being limited in their application to the subjects of those Powers whilst resident within the Ottoman Territory. These will require special notice in their proper place when the rights of Treaties are discussed; it will be sufficient for the present to have alluded to them.

Constitution of the Ottoman Empire.

§ 63. The Ottoman Empire is *constitutionally* a Single State, composed of thirty-six[5] General Governments, termed "Eyalets," which are subdivided into Provinces (livas or sandjaks); the Provinces are in their turn subdivided into Districts (Cazas or Centres of Justice), which are again subdivided into Cantons (nahyès) composed of Villages or Hamlets. This uniformity of organisation, which in theory pervades the entire Empire, dates only from the reign of the present Sultan Abdul Medjid, who succeeded to the throne in the year 1839. Of these Eyalets fifteen are in Europe, eighteen in Asia, and three in Africa. But although such is the theoretical organisation of the Ottoman Empire, there is practically a distinction between those portions of it, which are directly subject to the authority of the Emperor or Padischah of the Ottomans, such as the Asiatic Eyalets, the Eyalet of Tripoli in Africa, and the European Eyalets, exclusive of the Danubian Principalities and Montenegro, and certain other portions of it, which are only indirectly subject to the Central Authority, and which, whilst they are recog-

5 This number is given in the Imperial Almanack (Salnamé) of 1854, and is adopted by Ubicini, La Turquie Actuelle, Introduction, p. 16.

nised internationally as integral parts of the Ottoman Empire, are governed either by hereditary Paschas or Beys, as in the case of Egypt and Tunis, or by native Princes nominated for life, as in the cases of the Christian Principalities of Walachia, Moldavia, Servia, and Montenegro. Each of these four Christian Principalities enjoys the privilege of an independent legislature and of an independent internal administration; but these anomalous portions of the Ottoman Empire do not stand in any common relation either towards one another or towards the Porte, except so far as they participate in the general character of Dependencies. By a strict application of its Religious Law (The Coran, IX. 29.) the Porte holds each of its Christian Dependencies by the obligation of paying *Tribute* and obeying the General Law of the Empire. The Mahommedan Dependencies, on the other hand, are bound to meet the Padischah's requisitions in men and money for the purposes of war. The general rule has been modified in particular instances owing at one time to the weakness of the Porte, at others to the interference of Foreign Powers taking the form of Treaty-engagements, to which effect has been given by the Emperor's Firman or Edict. In a few cases there have been original Capitulations between the Porte and its Dependencies. No class of Dependency has a separate power of making peace or declaring war. They all follow in these matters the lead of the Porte, and would in consequence thereof, without some special provision for their Neutralisation, be liable to hostile treatment whenever the Porte is at war with a Foreign Power. Tunis alone stands in an exceptional position. As a Dependency of the Empire, liable to be called upon to furnish its military Contingent, it might be fairly included in a Declaration of War against the Ottoman Porte. But

Christian Dependencies merely subject to Tribute.

Mahommedan Dependencies.

Exceptional Position of Tunis.

several of the Christian Powers of Europe, maintaining a state of amity with the Porte, have separate treaties directly with the Government of Tunis, and on that account Tunis might reasonably be considered by such Powers as not of necessity involved in hostilities, if war should arise between those Powers and the Porte. The Porte, it is true, has never acknowledged the right of its Dependencies on the Barbary Coast to enter into separate treaties with the European Powers, on the contrary, such treaties have been always ignored by the Porte, and the Padischah has from time to time in his Sovereign character entered into Treaty-engagements with the European Powers, whereby he has undertaken to restrain the Governors of those Dependencies from all acts of hostility against those Powers. Still the Bombardment of Algiers by the European Powers in 1815 was held to be consistent with a state of Peace between those Powers and the Ottoman Porte, and the subsequent attack and occupation of Algiers by the French did not bring on War between France and the Ottoman Empire.

The States on the Barbary Coast.

§ 64. The Dependencies of the Porte on the Barbary Coast were formerly three in number, Algiers, Tunis, and Tripoli. Of these, Algiers was not originally a conquest of the Porte, but an acquisition of the Greek Renegade Kharaddin, better known as Barbarossa, who first introduced the practice of piracy in the Mediterranean and Levant Seas, and left it an established institution amongst the Mussulman tribes of the Barbary Coast. Barbarossa and his brothers were in fact *Condottieri of the Sea.* They had under the pretext of commercial enterprise established an armed fleet in the Mediterranean, and

Algiers.

when Selim, the last Independent Prince of Algiers, was hard pressed by the united forces of the Spaniards and the Arab Tribes in alliance with the Emperor

Charles V, Barbarossa brought his squadron to his aid, and upon his death succeeded to his Sovereignty. He was however sensible of his inability to struggle alone with success against the Powers of Christendom, and he accordingly hastened to place himself, as a vassal, at the feet of the Padischah of the Ottomans, who readily accepted his submission in that character, and conferred upon him the government of his newly acquired territory with the title of Bey. The subsequent career of Barbarossa fills a considerable page in the History of the Ottoman Empire. By the orders of the Emperor Soleiman I, he led his fleet against Tunis with a view to dethrone the Sultan Moulei Hasan, and to supplant his dynasty. His success was but temporary, and Tunis was restored to the ancient dynasty of Beni-Hafas by the united arms of the Emperor Charles V and the Knights of Malta. Tunis experienced subsequently great vicissitudes. The Spaniards under Don John of Austria regained possession of it for a short time in 1572, but in 1574 it passed definitively into the hands of the Ottomans, and it continues in the present day to be a Dependency of the Porte. Tunis.

Tripoli had meantime been wrested by the Ottoman arms from the Knights of St. John of Jerusalem, and it was placed in like manner under the government of a Beylerbey. It was after this period that other Renegades from Christianity, taking advantage of the religious law of the Mussulman, which contemplates a permanent state of war to exist between the true Believer and the Unbeliever, capable of being suspended only by express treaty or by payment of tribute, gave so great a development to piratical enterprise in the ports of the three Barbary Powers, that they came to be considered in Europe as mere nests of pirates, which had usurped the cha- Tripoli.

racter of political Bodies. So formidable indeed were the ravages of the Algerine Corsairs in the Seventeenth Century, and so inefficient was the Sovereignty of the Ottoman Porte to restrain them, that the Christian Powers of Europe found it expedient to conclude Conventions directly with the Barbary Governments in furtherance of treaties already existing with the Ottoman Porte. Thus Louis XIII of France concluded a treaty at Marseilles with the Pascha of Algiers (24 March 1619)[6], whereby the latter bound himself to observe more faithfully than heretofore the commands of the Porte in regard to its Capitulations with France. In the following year, Great Britain prepared to attack Algiers with a fleet under the command of Admiral Monson, but the projected hostilities were diverted by the payment of an indemnity from the Ottoman Porte. This result had been brought about through the instrumentality of Sir Thomas Roe, who had been despatched to Constantinople to open negociations directly with the Porte[7]. Special treaties were soon after concluded between England and the Regencies of Algiers and Tunis respectively, which received the confirmation of the Padischah. In the middle of the Seventeenth Century King Charles II of England despatched the Earl of Winchelsea, (anno 1660,) as Ambassador to the Governor of Algiers, who had very recently assumed the title of Dey, and concluded a Treaty of Commerce directly with the Dey, the main object of which was to secure British Merchant Vessels from piratical seizure.

Treaties with Algiers.

§ 65. It appears from the Treaty concluded by Sir John Finch in 1675, between the Ottoman Porte and

Early Treaties with the Sublime Porte.

6 Flassan Histoire de la Diplomatie Francaise II. p. 329. Dumont, Traités L. V. pt. II. p. 330.

7 Roe, Negociations with the Ottoman Porte, p. 35. 260. Von Hammer. Histoire de l'Empire Ottoman, IX. p. 30. Paris 1837.

England[8], which recites and confirms the Articles of all the previous Treaties, that in the earliest Treaty with England, the Ottoman Porte had agreed "that the English Ambassadors may at their pleasure establish Consuls, resident in Aleppo, Alexandria, Tripoli of Syria, or Tunis, Algiers, Tripoli of Barbary, in Smyrna, the parts of Cairo, or any other parts of our dominions, and in like manner remove them or change and appoint others in their places, and none of our Ministers shall oppose or refuse to accept them;" and further, "the English Nation's Consul or Resident in any part of our dominions, being established by the Ambassador resident for the English Nation, our Minister shall have no power to imprison or examine them, or seal up their houses, nor to dismiss or displace them from their charge or office; but in case of any difference or suit with the Consul, there shall be made a Certificate to the Imperial Porte, to the end that the Ambassador may protect or answer for them."

Although therefore stipulations are found in the Treaties concluded with the Barbary States respecting the protection to be afforded to the Consuls of the European Powers, it must be borne in mind that the Consuls were not accredited to the Barbary Powers, as some writers on International Law assume, but exercised their functions under Treaty-engagements with the Porte itself. Molloy[9], in speaking of the Barbary Powers in the reign of Charles II, misled perhaps by the fact that the Earl of Winchelsea, the Ambassador of England to the Ottoman Porte, concluded a Treaty with the Dey of Algiers on his passage to Constantinople, partakes in the common error of describing them as nests of pirates which, notwithstanding this, "obtain the right of legation and

[8] Hertstet's Treaties, II. p. 349. [9] De jure Maritimo, p. 38. § 4.

having acquired the reputation of a Government, cannot now possibly be esteemed pirates, but enemies." He had previously described them more correctly as "Governments or States, upon which, although they acknowledged the supremacy of the Ottoman Porte, yet all the Power of it cannot impose more than their own wills voluntarily consent to." The Governments themselves, although *de jure* held during the pleasure of the Padischah, had become in practice, owing to the weakness of the Porte, Hereditary Regencies. The Bey however on his accession never omitted to claim the sanction of the Sultan, which with an appearance of demur was usually granted on the presentation to his Imperial Majesty of objects more or less valuable, qualified by the Porte as *tribute*, and by the Bey as a *free gift*. In cases of war the Bey furnished a contingent, the quality and amount of which he strove to regulate according to circumstances. Such is still the condition of Tunis in the present day. The Porte has by force of arms within recent times reduced Tripoli to the condition of an immediate *Paschalik* like the Asiatic *Eyalets*, and had resolved to compel Tunis to submit itself in a similar manner to the absolute will of the Padischah. France however threatened to interfere in defence of the Bey, and Tunis has remained undisturbed. Algiers, on the other hand, has ceased to form a portion of the Ottoman Empire in any sense, since it passed into the hands of the French Nation in 1830.

The Barbary States in practice Hereditary Regencies.

§ 66. The condition of Egypt may be regarded as the result of an European International Compact, as although it has been in form settled by a Firman or Edict of the Padischah of the Ottomans, that settlement was the result of an agreement between the Porte and four of the Great European Powers, and

Paschalik of Egypt.

has received the Guaranty of those Powers under a Treaty concluded between them and the Porte, (15 July, 1840[10].) The power of the Mamelukes had survived the Ottoman conquest of Egypt, and although after that conquest the government was always administered by a Turkish Pascha, nominated by the Padischah, and holding office during pleasure, the more powerful Beys of the Mamelukes continued to be the real Governors of Egypt[11], until they were annihilated by the craft and treachery of Mehemet Ali. It was not until after that event that it became possible for the Pascha of Egypt to raise the standard of Independence; and Mehemet Ali was not slow to take advantage of the weakness of the Porte, when the opportunity presented itself. After a series of five successful conflicts with the Ottoman forces during the year 1832, the victorious army of Mehemet Ali encamped at Kutayeh, and threatened Constantinople, when the intervention of a Russian fleet, which cast anchor in the Bosphorus on 20th Feb. 1833, alone saved the throne of the Padischah. The Convention of Kutayeh, (5 May, 1833,) put an end to hostilities, and gave to Mehemet Ali the whole of Syria and the Paschalik of Adana. In the war which subsequently ensued, the successes of Mehemet Ali again threatened to impair the integrity of the Ottoman Empire, and the Independence of the Sultan's Throne; which circumstance led to the intervention of Great Britain, Austria, Prussia, and Russia, "in the interests of the peace of Europe." These Powers accordingly became parties to a quadruple treaty with the Porte, (Treaty of London, 15 July, 1840[12],) under

Destruction of the Mamelukes.

Treaty of London, 15 July, 1840.

[10] Martens, N. R. Général, I. p. 156.

[11] Von Hammer, Histoire de l'Empire Ottoman, IV. p. 270.

[12] Martens, N. R. Gén. I. p. 156.

which they agreed to enforce against Mehemet Ali the provisions of an arrangement settled between themselves and the Sultan; the details of which were specified in a separate Act annexed to the Treaty. Under this arrangement the Sultan was to grant to Mehemet Ali the administration of the Paschalik of Egypt, with the reversion of it to his descendants in the direct line, subject to the payment of an annual tribute. France stood aloof from any participation in this Treaty, but seconded the result by her moral influence at Alexandria[13]. It may accordingly be considered to be now a part of the Conventional Law of European Nations, that the Pascha of Egypt, as long as he is a direct descendant of Mehemet Ali, may transmit the Government of that country to his heirs, subject to the payment of tribute to the Padischah of the Ottomans as his Sovereign. The Sublime Porte, however, is still the authority to which Foreign Nations must address themselves in the first instance, in all International matters which concern Egypt. The Porte still grants the Exequatur to Foreign Consuls resident at Alexandria or Cairo, and it gives operation to Treaties of Commerce, which concern Egypt, by its Firman addressed to the Pascha and requiring him to give full power and effect to such treaties.

The Principality of Servia.

§ 67. The Christian Principalities of the Ottoman Empire which are situated in Europe, are of a different character both *politically* and *internationally* from the Mahommedan Governments in Egypt and on the Barbary Coast. They consist of Servia, the two Danubian Principalities as they are sometimes termed, namely Walachia and Moldavia, and the

[13] Memorandum of M. Thiers, Minister of Foreign Affairs, (5 Oct. 1840.) Martens, N. R. Gén. I. p. 183.

Prince-Bishopric of Montenegro. Servia is the most important of these States, whether we regard its political antecedents, or its present military power. The Servians in the Twelfth Century had laid the foundation of an Empire which underwent rapid development, and which embraced, in the middle of the Fourteenth Century prior to the Ottoman Invasion, all Macedonia, certain towns in Thessaly and Albania, and portions of Thrace. The Independence of Servia terminated with the disastrous battle of Kossova, (15 June, 1389,) after which event its territory was divided by its Ottoman conquerors into various Paschaliks, the chief of which was established at Belgrade. It was not until the commencement of the present century, (anno 1804,) that the Servians awakened to the recollection of their former Independence, and rose in insurrection against the Janissaries of Belgrade, who in defiance of the stipulations of the Treaty of Sistova[14] (4 August, 1791) had re-occupied Servia and were perpetrating cruelties of the most atrocious character. The Servians, under the leadership of Kara George, and with the countenance of the Porte itself, succeeded in expelling the Janissaries out of Servia, and afterwards finding their newly acquired liberty too sweet to be relinquished, resolved to establish a National Government with Kara George as its Chief (Vosd). The Russian Government had meanwhile undertaken to advocate the cause of the Servians with the Porte, and when war broke out in 1806 between Russia and the Porte, the Servians having successfully laid siege to Belgrade, joined their forces to those of Russia. The peace of Bucharest (28 May, 1812[15]) left the Servians practi-

Treaty of Sistova, 4 Aug. 1791.

Treaty of Bucharest, 28 May, 1812.

[14] Martens, Recueil, Tom. V. p. 244.
[15] Martens, N. R. Tom. III. p. 197.

cally at the mercy of the Porte, although Russia had made certain highly favourable stipulations on their behalf in her treaty with the Porte, and Servia was thereupon once more reduced to the condition of a Turkish Province. But the spirit of Independence amongst the Servians was not extinguished. It broke forth at intervals, was countenanced by Russia, and at last, with the support of that Power, Servia obtained from the Porte the recognition of its administrative Independence, in pursuance of the provisions of the Treaty of Adrianople[16] (14 Sept. 1829) concluded between Russia and the Ottoman Porte. This recognition took place under the form of a Hatti Scheriff, (29 Nov. 1829,) in which the Sultan declared, that having regard to the Treaties of Bucharest and Adrianople, as well as to the Convention of Ackerman[17], (7 Oct. 1826,) and likewise to the prayers of the Servians, who had always been faithful subjects of his Empire, he had accorded to them the liberty of Christian Worship, and an Independent Internal administration, with various other privileges in accordance with the provisions of a separate Act annexed to the Treaty of Ackerman. The existing Constitution of Servia was subsequently settled by an Organic Statute, issued by the Sultan in 1838. This Statute confers the Sovereignty of the Province upon Prince Milosch and his family, the princedom being declared to be hereditary in his family; and after enumerating other matters of detail, confers upon him (A) the nomination of public functionaries, (B) the command of the troops, (C) the powers of the Exequatur, (D) the collection of the taxes, (E) the control of the provincial authorities, (F) the jurisdiction over criminals. At this period, (anno

Treaty of Adrianople, 14 Sept. 1829.

Treaty of Ackerman, 7 Oct. 1826.

Organic Statute of Servia.

[16] Martens, N. R. VIII. p. 116.

[17] Ibid. VI. p. 1053.

1829,) when Lord Ponsonby on behalf of Great Britain was suggesting certain modifications in the Organic Statute, the Sultan refused to recognise any title in Great Britain to interfere in the affairs of Servia; but admitted the right of Russia under her treaties with the Porte to exercise a voice. The Treaty of Paris[18], (30 March, 1856,) has placed the established relations between Servia and the Ottoman Porte under the collective guaranty of all the Powers which are parties to that treaty. The Suzerainty of the Porte, and its right of garrison as heretofore, is maintained on the one hand; whilst, on the other hand, the Principality of Servia retains its National and administrative Independence, as well as full liberty of worship, legislation, commerce, and navigation; nor can any armed intervention take place in Servia without a previous accord amongst the High Contracting Powers. It would be out of place in the present treatise to follow the fortune of Prince Milosch and his family; it will be sufficient to have traced the International vicissitudes of the Principality, and to have shewn how its present anomalous state of International transition is founded upon Treaty-engagements between the European Powers and the Emperor of the Ottomans, in his character of Suzerain.

The Principalities of Walachia and Moldavia.

§ 68. The Principality of Walachia had paid tribute to the Ottoman Porte since the commencement of the Fifteenth Century, although the Sultans were not really masters of Walachia until the death of Wlad, (anno 1461,) the last Independent Prince. From this period down to 1521, Walachia was governed by its own Voievodes, elected by the Boyards and confirmed by the Sultan. Soleiman I, whose

[18] Martens, N. R. Général, XV. p. 770.

brilliant reign has earned for him from Christian historians the titles of the Great and the Magnificent, but whom the Ottomans have distinguished by the more modest epithet of the Lawgiver, determined to add Walachia substantively to his Empire, and to place over it a Governor of his own choice. He accordingly appointed Mahommed Bey to the post of *Sandjakbey* of Walachia. This personage, having lulled the Boyards into security by a Treaty, in which he guaranteed to them their ancient privileges, caused the Prince, whom they had elected according to custom, to be assassinated at the moment when the Sultan's Commissary pretended to instal him into office. So flagrant an atrocity led to the armed intervention of the Hungarians under Jean Zapolya, and the Sultan was induced, after a series of disastrous conflicts, to restore the Principality to its ancient condition of a tributary State under an elective Prince. Moldavia, on the other hand, had recognised the Sovereignty of the Ottoman Porte in 1516, and after the campaign of Vienna, Raresch, Prince of Moldavia, did homage to the Sultan Soleiman I, and received from him a diploma which secured to the Christian population the liberty of religious worship, and conferred upon the Boyards the election of the Prince, subject to the ratification of their choice by the Sultan, and to the condition of paying an annual tribute at Constantinople. The fortunes of Moldavia were for a short time mixed up with those of Transylvania, which latter province upon the conclusion of the peace of Sitvatorok, (11 Dec. 1606,) had also become a tributary State of the Ottoman Empire under the government of an Elective Prince. Soon after that event the Estates of Transylvania elected Gabriel Bethlen to be their Voievode, (anno 1613,)

Peace of Sitvatorok, 11 Dec. 1606.

who being supported by the Porte in his schemes of territorial aggrandisement against Hungary, but not daring to place upon his own head the ancient Crown of St. Stephen, endeavoured to found a new Empire. In this policy Gabriel Bethlen was supported by England, France, Holland, and the Republic of Venice, and was even permitted by the Sultan to enter directly into political treaties with those Powers. The Emperor Ferdinand II was ultimately fain to conclude two successive treaties[19] with Gabriel Bethlen as an Independent Prince: and upon the reestablishment of peace between the Emperor and the Sultan, Gabriel Bethlen demanded for himself from the Porte the investiture of the principalities of Moldavia and Walachia, with the title of King of Dacia. The death of Gabriel Bethlen, which happened soon afterwards from natural causes, opened the way to great changes in the condition of the Principalities. Rakcoczy was elected to the office of Voievode by the Estates of Transylvania, and his election was confirmed by the Ottoman Porte. Moldavia on the other hand, and Walachia, which had hitherto been governed by native Princes, became a prey to the avarice of the Viziers of the Porte, and to the intrigues of Greek and other adventurers, who pretended successively to the Crown of Dacia[20].

Treaty of Carlowitz, anno 1699.

The Treaty of Carlowitz[21] (anno 1699) deprived the Ottoman Porte definitely of its Suzerainty over Transylvania, and soon afterwards the Boyards of Moldavia were authorised by the Sultan to choose as Hospodar (or Farmer of the Province) one of

[19] Von Hammer, Histoire de l'Empire Ottoman, IX. p. 118.

[20] Moldavia was ruled successively by Yankoul a Saxon, (anno 1580,) Gratiani, a Croat, (anno 1618,) Bernawski, a Pole, (anno 1626,) and Alexander Elias, a Greek, (anno 1620—1631.)

[21] Schmauss, Corp. Jur. p. 1133.

themselves, (3 Oct. 1703.) The Voievodeship of Walachia was meanwhile sold for the most part to the person who offered the highest rent as Hospodar, and gave the most costly presents to the Grand Vizier. The two Principalities were now and then granted to one and the same person, but the instances of this twofold Investiture are very rare.

Treaty of Kutschauk-Kainardji.

§ 69. Such is an outline of the political vicissitudes through which the two Danubian Principalities have passed, prior to the Treaty of Kutschauk-Kainardji[22], (10 July, 1774.) By this treaty, the Empress Catharine of Russia agreed to restore to the Porte the province of Bessarabia, and the Principalities of Moldavia and Walachia, which the Russian armies had overrun. The stipulations in favour of the Principalities were peculiar. It was provided that the inhabitants should have the free exercise of the Christian Religion, and that the Prince of each Principality should be allowed to maintain a Chargé d'Affaires at Constantinople, to superintend the affairs of each Principality, and who should be entitled to the privileges of an Envoy under the Law of Nations. The Porte also consented that the Russian Ambassador at Constantinople might advocate the cause of the Principalities, if circumstances required it; and promised to listen to him with respect and favour. An explanatory Convention was subsequently signed at Constantinople, (10 March, 1779[23],) in which the right of the Porte to levy tribute from the Principalities was submitted to certain regulations. By the next following Treaty of Bucharest, (28 May, 1812[24],) the Ottoman Porte ceded to Russia those portions of Moldavia which lay on the left bank of the Pruth;

Convention of Constantinople, 10 March, 1779.

Treaty of Bucharest, 28 May, 1812.

[22] Martens, Recueil, II. p. 286. [23] Ibid. p. 653.
[24] Martens, Nouveau Recueil, III. p. 397.

which river was to be henceforth the boundary of the Ottoman and Russian Empires. The subsequent Treaty of Adrianople (14 Sept. 1829) made an important change in the International Status of the Principalities. The Fifth Article, which referred to Moldavia and Walachia, as being under the Suzerainty of the Porte and the Guaranty of Russia, stipulated that they should enjoy an Independent National administration, and full liberty of commercial intercourse, with special reference to certain provisions contained in a separate Act annexed to the Treaty. Under this Act it was provided that the office of Hospodar should be an office for life; subject in other respects to the regulation of the separate Act of the Convention of Ackerman[25], (7 Oct. 1826.) By the latter Act, which purported to explain the Treaty of Bucharest, it had been provided that the Hospodars should not be dismissed from their office by the Porte, without the permission of Russia; and the Russian Consuls were empowered concurrently with the officers of the Porte to remonstrate with the Hospodars, if they should infringe in any manner the privileges of the Country in regard to taxes and other imposts. The Porte further undertook by the Treaty of Adrianople, (14 Sept. 1829,) that no Mussulman should set foot in the Principalities except for temporary purposes of commerce. The Internal administration of the two Principalities was to be perfectly Independent, and their Governments were authorised to raise a native militia for the purpose of enforcing the Quarantine regulations, protecting the frontiers, maintaining peace and order, and executing the laws. By a subsequent Treaty signed at St. Petersburg, (29 Jan. 1834,) and kept secret for

Treaty of Adrianople, 14 Sept. 1829.

Convention of Ackerman.

Treaty of St. Petersburg, 29 Jan. 1834.

[25] Martens, N. R. VIII. p. 143. [26] Ibid. N. R. VI. p. 1053.

some time[27], it was agreed that the Hospodars should for that turn be nominated according to an agreement between Russia and the Porte; and it was further stipulated that the Porte should give regimental colours to the native militia which kept garrison in the Interior of the two Provinces; and a flag for the Walacho-Moldavian merchant vessels navigating the Danube.

Convention of Balta Liman, 1 May, 1849.

The last Convention which it is necessary to notice is that of Balta Liman[28], (1 May, 1849,) under which Russia and the Porte by common consent suspended the existing political Constitution of the Principalities, as established by the Organic Statute of 1831, and made arrangements for a Commission of Boyards to submit a new political Constitution for the mutual approval of the two Courts. Meanwhile Russian and Ottoman troops were to occupy the Principalities, and the two Courts were to have each an extraordinary Commissioner resident in the Principalities. These Commissioners were to offer their advice and counsel in common to the Hospodars, and were to agree together in selecting the Commission of Boyards to revise the Constitution. It was further provided that all the previous treaties confirmed by the separate Act of the Treaty of Adrianople should retain their full force and effect.

§ 70. It is difficult in examining the Convention of Balta Liman to appreciate the political relations under which the two contracting Powers respectively claimed to deal with the Internal affairs of the Principalities. It is recited in the preamble, that they

[27] This circumstance may account for this treaty not being found in any general collection of treaties. It occurs amongst the Treaties (Political and Territorial) between Russia and Turkey, 1774—1849,) presented to both Houses of Parliament by command of her Majesty, 1854.

[28] Martens, N. R. Général, XIV. p. 378.

act in a spirit of fidelity to their antecedent engagements, which secure to the Principalities the privileges of a distinct administration and certain other local immunities; and that it has become necessary to adopt by common agreement extraordinary and effectual measures for the *protection* of those immunities and privileges, which the Principalities ought to enjoy, in virtue of solemn treaties concluded between Russia and the Sublime Porte. It would thus seem that the right of joint action on the part of the Two Powers was held to rest on antecedent Treaty-engagements, under which they were called upon to exercise a joint *Protectorate* over the Principalities. The Sixth Article reserved to the two Courts the right at the expiration of seven years to take into consideration the then existing State of the Principalities, and to determine upon the ulterior measures which they might judge most suitable, to ensure their wellbeing and tranquillity. No allusion was made throughout this Convention to the Sovereignty of the Sublime Porte, and the two Imperial Courts were to have in substance an equal voice in directing the political action of both Principalities. The establishment of a Russian Resident in each Principality by the side of an Ottoman Resident, with a right of *political action* within a certain sphere, as distinguished from the *commercial agency* of a Consul, was ostensibly a step in the direction of recognising the Independence of the Principalities. On the other hand, as each Resident was entitled under the treaty to advise and counsel the Hospodars, each Power possessed an indirect right to control the Internal administration of the Principalities. The right of the Sultan indeed rested upon ancient Capitulations with the Principalities themselves, whereas the

right of the Emperor of Russia rested upon Conventions with the Sultan; who may be thus taken to have bound himself by treaty to share with Russia the active duties of the Suzerainty, which he exercised under the Capitulations.

Treaty of Paris.

§ 71. Such was the peculiar *Status* of the Danubian Principalities before the Treaty of Paris. Their political relations were certainly ambiguous, but there is no difficulty in arriving at the conclusion that they were not Members of the Family of Nations. They had not the right of Legation under the Law of Nations, for the reception of their Resident Chargés d'Affaires at Constantinople was exceptional, and their functions were regulated by a special convention between the Porte and Russia; they had not the right of Alliance, as all public treaties respecting the Principalities were concluded between their Suzerain and Foreign Powers. The Consuls maintained by Foreign Powers at Bucharest and Galatz were accredited to and received their Exequatur from the Sublime Porte, and no political or commercial agents on behalf of the Hospodars have ever been received by Foreign Courts. The conditions of the Principalities in all these respects have not been in any way changed by the Treaty of Paris[28] (30 March, 1856). By Article XXII, the Principalities of Walachia and Moldavia are to continue to enjoy under the Suzerainty of the Porte and the Guaranty of the Contracting Powers the privileges and immunities of which they are in possession. No exclusive *Protection* is to be exercised over them by any of the Guaranteeing Powers, nor is any Power to have any special right to interfere in their internal affairs. By Article XXIII, the Sublime Porte engaged itself to secure to the Princi-

[28] Martens, N. R. Général, Tom. XV. p. 770.

palities an Independent and National administration, as well as perfect liberty of worship, legislation, commerce, and navigation; and after the opinion of the Representatives has been taken as to the definitive organisation of the two provinces, the Porte undertook to confirm that organisation by a Hatti-Scheriff, and the Provinces were henceforth to remain under the collective guaranty of all the Contracting Powers. The Principalities are to have a National army to maintain public order and to protect their frontiers, and no armed intervention can take place without a previous agreement amongst the Powers who have signed the Treaty of Paris.

The Danube and the Dardanelles.

§ 72. The Sublime Porte had remained a stranger to the proceedings of the Christian States assembled at the Congress of Vienna in 1815, and the waters of the Danube were not subject to the regulations then made for the navigation of the Great Rivers of Europe. The Treaty of Paris (30 March, 1856) may be considered as the formal Act of Reception of the Sublime Porte into the Fellowship of European Nations. The independence and integrity of the Ottoman Empire is guaranteed by all the Contracting Powers, and every act, which may threaten its existence, is declared to involve a question of general interest. The Contracting Powers further undertake to act as Mediators in any dispute which may arise between the Porte and any of their number, and they disavow all right to intermeddle with the internal administration of the Ottoman Empire. They agree to respect the ancient rule of the Ottoman Porte to keep the Straits of the Bosphorus and the Passage of the Dardanelles closed against Foreign Ships of War, whilst the Porte is at peace with other Nations. The Black Sea is altogether neutralised and declared to be for ever

Neutralisation of the Black Sea.

forbidden waters to the ships of war of all Powers, with certain exceptions as to armed vessels for purposes of police pursuant to a separate Convention between Russia and the Porte. The Regulations of the Congress of Vienna as to the navigation of the Great Rivers of Europe, as forming part of the Public Law of Europe, are extended to the Danube, with an additional provision, that the task of keeping open its navigation shall be confided to a Permanent Board of Seven Commissioners, four of whom are to be nominated by the Riverain Powers, to wit, Austria, Bavaria, the Sublime Porte, and Würtemberg, and the other three, by the three Danubian Principalities, Walachia, Moldavia, and Servia, subject to the approval of the Porte. Each of the Contracting Parties is, by the provisions of the Treaty, entitled to keep two vessels of war of light draught of water permanently stationed at the mouth of the Danube.

The Principality of Montenegro.

§ 73. Montenegro, or Tzernegóra, as it is styled in the language of the native people, is a small State, which forms *de jure* an integral part of the Ottoman Empire. It is called by the Ottomans Karadagh, which has the same meaning as Tzernegóra, namely, the Black Mountain; the name of the people in their own language is Tzernegórki. Montenegro is considered by the Ottomans to be a department of the Paschalick of Scutari. It was originally a district of Servia, when that Country was ruled by its own Kings, and it was governed by a Prince dependent on the Servian Monarch. After the Conquest of Servia by the Ottomans (anno 1389), the Princes of the Family of Tzernoievich maintained for a considerable time their Independence, but the Ottoman Armies having overrun Albania and obtained possession of Herzegovina, George Tzernoievich with the consent of the people

transferred the Government of Montenegro into the hands of the Bishop, and withdrew to Venice (anno 1516). Since that period the Spiritual and the Temporal Powers have been vested in a Prince Bishop, who is entitled the *Vladika*, which signifies Prince or Ruler. This Office, although *de jure* elective, has been in practice hereditary in the Family of Petrovich since the close of the Seventeenth Century, but as every Vladika is consecrated Bishop and cannot marry, the succession has always passed to a nephew, or such other member of the family as might happen to be the next heir. The Ottomans during the Sixteenth Century made frequent inroads into the Country, but failed to establish themselves in it, and it was not until A.D. 1623 that Soleiman, Pascha of Scutari, succeeded in penetrating to Tzetenie, the Capital, when the Supremacy of the Sublime Porte was in name established over the Black Mountain. The Ottomans, however, have never been able to remain in possession of the Country, and the Montenegrins have been always ready to cooperate with the Venetians, or with the Austrians, in their war against the Porte. By the Treaty of Carlowitz[29] (anno 1699) Montenegro appears to have been left by the Ottomans under the Protectorate of Venice. By the Treaty of Passarovitz (anno 1718)[30] it was in terms ceded back by Venice, and became again subject to the Porte, and its dependence on the Porte was recognised by Austria in the Treaty of Sistova[31] (anno 1791), when the latter Power stipulated that the Montenegrins should not be molested or punished by the Porte for having declared against their proper Sovereign. Relations of a very singular kind were

The Vladika, or Prince Bishop.

Treaty of Carlowitz.

Treaty of Passarovitz.

Treaty of Sistova.

[29] Schmauss, Corp. Jur. p. 1133. [30] Id. p. 1740.
[31] Martens, Recueil, Tom. V. p. 244.

established in 1706 between the Montenegrins and the Emperor Peter the Great of Russia. The Montenegrins placed themselves formally under the *Protection* of Russia and took the oath of allegiance to the Czar, since which period it has been usual for the successor of each Vladika to receive consecration at St. Petersburg, and his consecration as Bishop has been a virtual investiture of his office as Vladika. It is stated by some writers[32] that the Vladika, who succeeded in 1830, refused the Episcopal dignity and was a lay Chief. The more correct account is as follows :—On the death of Pietro I. on the 30th Oct. 1830, his nephew whom he had recommended as his successor, being only fifteen years of age, was admitted into Holy Orders, but being too young to take the reins of Government, or receive the Episcopal dignity, a *locum tenens* was appointed, and Sr. Ivanovich was sent from St. Petersburg to govern the Country, until the consecration of the new Vladika. This took place at St. Petersburg on 18th August, 1833,[33] after which the youthful Vladika returned to his own Country and carried on the Government until his death in 1851, when he was succeeded by Daniel I, who perished by the hand of an assassin in 1860. It was the late Prince Daniel I, whose early education was carried on at Vienna and not at St. Petersburg, who once more separated the secular functions of the office of Prince from the spiritual functions of the office of Bishop. His Code of Laws[34] promulgated at Tzetenie, 23 April, 1855, purports to be issued under

The Prince of Montenegro no longer Bishop.

32 Phillimore's International Law, Tom. I. § 94.

33 Wilkinson's Dalmatia and Montenegro, I. p. 464.

34 A German translation of this Code has been published at Vienna under title of Gesetzbuch Danieli I. Fürsten und Gebieters von Montenegro und der Berda. Wien, 1859. Verlag von Friederich Manz.

the hand of Daniel Prince of Montenegro and Prince of Berda, the latter title being taken from the Eastern division of the Country.

Since the Peace of 1815 the Montenegrins have been constantly at war with the Ottoman Porte, and the latter Power has made the most determined efforts to reduce them to submission both in 1839 and in 1852. On the latter occasion Russia and Austria employed their good offices on behalf of the Montenegrins, whilst France and Great Britain counselled the Porte to respect the *de facto* Independence of Montenegro, without abandoning its *de jure* Title over the Country. The Montenegrins have, however, never obtained the recognition of their Independence as a Nation, and at the Congress of Paris (1856) the Ottoman Plenipotentiary took occasion to declare that "the Sublime Porte considers Montenegro to be an integral part of the Ottoman Empire, but that it has no intention to alter the actual state of things in that Country."[35]

Congress of Paris.

35 Protocol of Conference 25 and 26 March, 1856. Martens, N. R. Général, XV. p. 736. 738.

CHAPTER V.

SOURCES OF THE LAW OF NATIONS.

Natural and Positive Law—Natural Law of Nations—Positive or Voluntary Law of Nations—Vattel's Subdivision of Positive Law—Customary and Conventional Law—Identity of the Law of Nations with the Law of Nature, according to Hobbes and Puffendorf—The Law of Nations a Special Science, according to De Wolff and Vattel—Essential Difference between Nations and Individual Human Beings—The Law of Nature—Identical Natural Law of Rude and Civilised Nations—Growth of the Positive Law of Nations—Study of the Law of Nations in England—Courts of the Law of Nations—Customary or Consuetudinary Law of Nations—Customary Relations with Non-Christian Powers Exceptional—The Primary Principles of European Public Law applied to Mahommedan States—The Diplomatic Science—Conventional Law of Nations—Views of Martens and others contrasted with those of Schmalz and others—Ortolan's View of the Effect of Conventions on General Law—Wheaton's Earlier and Later Views—Illustration as to Contraband of War—Declaration of Maritime Law at Paris, 16 April, 1856—Preambles and Recitals of a Declaratory Character—Objections to the Idea of any Law, as such, between Nations—International Morality distinct from the Law of Nations.

Natural and Positive Law.

§ 74. THE proper and immediate subjects of the Law of Nations being those political communities which are in a state of Independence, and the test of their Independence being their aptitude or capacity to discharge the obligations of Natural Society towards other political communities and to regulate the mode of discharging those obligations without the consent of any Political Superior, the rules which result from their mutual relations, and which govern their intercourse, resolve themselves into Natural rules and Positive rules, and the aggregate body of those rules, which admit of being enforced, constitute the Law of Nations in the most extensive sense of the term.

The Law of Nations accordingly divides itself into Natural or Necessary Law, and Positive or Instituted Law.[1]

Natural Law of Nations.

§ 75. The Natural Law of Nations is founded on the Nature of Independent States, as such, and is the result of the relations observed to exist in Nature between Nations as Independent Communities.[2] The Positive Law of Nations, on the other hand, is based on the consent of Nations, and is the result of the relations instituted between them by their own free will. The sanction of the Natural Law of Nations is found in the fact that its violation terminates the existence of an Independent State, as such. The sanction of the Positive Law of Nations is found in the isolation of the State which disregards it. The obligation of the former is involuntary, whereas the obligation of the latter is consensual,[3] and the consent of Nations to it is either substantially evidenced by

[1] *Natural Law*, according to Puffendorf, is that which is so exactly fitted to suit with the rational and social nature of man, that human kind cannot maintain an honest and peaceful Fellowship without it. *Positive Law*, on the other hand, he writes, is sometimes called by the name of Voluntary, because no positive law has such an agreeableness with Human Nature as to be necessary in general for the preservation of mankind, or as to be known or discovered without the help of express and peculiar promulgation. Law of Nature and of Nations, B. I. c. 4. § 18.

[2] Esse autem aliquid juris naturalis probari solet ab eo quod prius est, tum ab eo quod posterius, quarum probandi rationum illa subtilior est, hæc popularior. A priori, si ostendatur rei alicujus convenientia aut disconvenientia necessaria cum natura rationali et sociali. A posteriori vero, si non certissima fide, certe probabiliter admodum, juris naturalis colligitur id, quod apud omnes gentes, aut moratiores omnes tale esse creditur. Nam universalis effectus universalem requirit causam ; talis autem existimationis causa vix ulla videtur esse posse præter sensum ipsum, communis qui dicitur. Grotius, de Jure Belli et Pacis, L. I. c. 1. § 12.

[3] Pacto obligamur ; lege obligati tenemur. Pactum obligat per se ; lex obligatum tenet virtute pacti universalis de præstanda obedientia. Hobbes de Civ. *Imperium*, c. 14. § 2.

their unvarying practice, or has been formally recorded in some Public Act or Convention.

Positive or Voluntary Law of Nations.

§ 76. Grotius in constructing his system of Public Law had perceived that certain rules of International Life, which were universally observed, could not be fairly deduced from any admitted principles of Natural Right. He concluded accordingly that they had been introduced by the Consent of Nations, and rested upon Custom and tacit Compact (moribus et pacto tacito introductum.[4]) It was this entire Body of Law which Grotius comprised under the head of *Jus Gentium Voluntarium* or *Jus Constitutum.*[5] De Wolff, on the other hand, distinguished the *Jus Voluntarium* from the *Jus Pactitium* and *Jus Consuetudinarium*, and whilst Grotius considered the Voluntary Law of Nations to be based upon the general consent of Nations as evidenced by their practice, De Wolff regarded it as a body of rules deduced from the nature of the Social Union amongst Nations, and from the operation of which no civilised Nation can withdraw itself. De Wolff accordingly held the Voluntary Law of Nations to be universally binding upon civilised Nations, whilst the obligation of the Customary Law of Nations was limited to those Nations, amongst whom it had been established by long usage.

De Wolff in establishing the foundations of that species of the Law of Nations which he termed Vo-

4 Sed sicut cujusque civitatis jura utilitatem suæ civitatis respiciunt, ita inter civitates aut omnes aut plerasque *ex consensu* jura quædam nasci potuerunt, et nata apparent, quæ utilitatem respicerent non cœtuum singulorum, sed magnæ illius universitatis. De Jure Belli et Pacis, Proleg. § 17.

5 Grotius divided Voluntary as distinguished from Natural Law, into law directly instituted by God and law instituted by Man, but he considered the instituted Law of God, as far as Nations are regarded, to be confined to the Jewish Nation. De Jure Belli et Pacis, L. I. c. 1. § 15, 16.

luntary, had assumed the existence of a Great Commonwealth (*Civitas Maxima*)[6] of which all civilised nations were members. The *Jus Gentium Voluntarium* accordingly occupied a place in the Great Commonwealth analogous to that which the *Jus Civile* holds in Individual States.

Vattel, however, has not followed De Wolff in his fiction of a Great Commonwealth of Nations; he holds that fiction to be neither very just nor very solid, but he has retained the division of Voluntary Law as distinct from Customary and Conventional Law. Vattel however does not agree with De Wolff in the grounds upon which the latter rests the obligation of Voluntary Law; on the contrary, he regards it as a branch of Positive Law derived from the *presumed* consent of Nations, whilst he rests the Conventional Law upon their *express* consent, and the Customary Law upon their *tacit* consent. As there can be no other mode of deducing any law from the will of Nations, there are only, he says, these three Species of Positive Law.

Subdivision of Positive Law.

§ 77. This threefold subdivision of the Positive Law of Nations, which Vattel has popularised, is objectionable in principle, and it is at the same time practically inconvenient. It is objectionable in principle, as it involves what Logicians term a cross-division, for Conventional and Customary Law are evidently *subordinate* branches of Voluntary Law, and it will tend rather to confuse than to elucidate the subject, if we should class them by the side of Voluntary Law as *coordinate Species* of one and the same *Genus*. In the second place, the threefold subdivision is practically inconvenient, for certain rules of international

[6] Civitas, in quam Gentes coivisse intelliguntur, et cujus ipsæ sunt membra, sive cives, vocatur *Civitas Maxima*. Jus Gentium, § 10.

intercourse which Vattel, following the authority of De Wolff, ranks under the head of Voluntary as distinguished from Conventional and Customary Law, would seem rather to partake of the character of Natural Law, as they are derived from the natural relations of independent political societies. For instance, in discussing the foundation of Voluntary Law Vattel says,[7] "It is therefore necessary on many occasions that Nations should suffer certain things to be done, though in their own nature unjust and condemnable, because they cannot oppose them by open force without violating the liberty of some particular States, and destroying the foundation of their *natural society*. And since they are bound to cultivate that Society, it is *de jure* presumed, that all Nations have *consented* to the principle which we have just established. The rules which are deducible from it constitute what De Wolff calls the Voluntary Law of Nations." It is obvious, however, that Nations are under a *natural* obligation to refrain from all acts which tend to destroy their Natural Society. A scrupulous respect for the independence of Individual States, evidenced by a systematic abstinence from all encroachments upon that independence, is a necessary condition of Permanent Fellowship amongst Nations. *Non-interference* to such an extent would thus seem to be a *natural law* of international life, and it is superfluous to presume a *consent of Nations* as an authority for the rule of such Non-interference. On the contrary, we should rather weaken the sanctions of such a rule, if we were to class it under the head of *Voluntary* as opposed to *Necessary Law*, and were to suppose it to rest upon the will of Nations rather than to be essential to their Fellowship. Voluntary Law, as a matter of

7 Droit des Gens, Préliminaires, § 21.

fact, ends where the Independence of Nations becomes imperilled, and it is not an optional matter to respect the liberty of individual Nations, when a disregard for that liberty would entail the dissolution of international Society.

Customary and Conventional Law.

§ 78. The identification of the Voluntary Law of Nations with the entire body of Instituted or Positive Law, and the employment of the term Voluntary Law to designate a *Genus* of which Conventional and Customary Law are the *Species*, has been approved by the more distinguished American Jurists. Mr. Wheaton[8] observes, that it is almost superfluous to point out the confusion in Vattel's enumeration of the different species of International Law, which might easily have been avoided by reserving the expression Voluntary Law of Nations to designate the *Genus*, including all the rules introduced by *positive consent* for the regulation of international conduct, and divided into the two species of Conventional and Customary Law. To the same effect Mr. Justice Story has observed, "By the Law of Nations we understand not merely that portion of Public Law which is generally recognised amongst Nations, (as seems to have been the prevailing use of the phrase in the Roman Code,) but that portion of the Public Law which regulates the intercourse, adjusts the rights, and forms the basis of the Commercial and Political Relations of States with each other. Perhaps the most appropriate name would be International Law, *Jus inter Gentes*. It has in this view been correctly subdivided into three sorts, first, the *Natural* or *Necessary* Law of Nations, in which the principles of Natural Justice are applied to the intercourse between States; secondly, the *Customary* Law of Nations, which embodies those usages

[8] Elements of International Law, c. 1. § 9.

which the continued habit of Nations has sanctioned for their mutual interest and convenience; and thirdly, the *Conventional* or *Diplomatic* Law of Nations, which embraces positive compacts by treaties and conventions between Nations, and derives its sole obligation from the same sources as other contracts. Under this last head many regulations will now be found which had first resulted from custom or a general sense of justice, and are now made of positive obligation for the purpose of preventing National disputes and collisions[9]."

Identity of the Law of Nations with the Law of Nature, according to Hobbes and Puffendorf.

§ 79. The Natural Law of Nations is capable of being distinguished from the Law of Nature, which governs the mutual relations and the intercourse of individual human beings. Hobbes[10] and Puffendorf[11] have maintained the identity of the rules, which result from the natural relations of States, with those which result from the natural relations of individual men, considering Nations to be aggregate bodies of human beings, having in the mass rights and obligations, which differ only in *degree* from those which the individuals have in their several capacities. According to this view there is no distinct Science of the Law of Nations. But these writers in maintaining that Natural Law, such as it is in reference to individual human beings, is identical with the Natural Law which governs the intercourse of Nations, have not discriminated sufficiently between Law and the Principles of Right which are embodied in Law. The Principles of Right (Droit) are beyond doubt invariable, but the mode in which those principles are ap-

9 Story's Miscellaneous Writings, p. 536. "On the value and importance of Legal Studies."

10 Hobbes De Civ. *Imperium*, c. 14. § 4.

11 Puffendorf, Law of Nature and of Nations, L. III. c. 3. § 23.

plied and developed undergoes infinite variations in accordance with the varying nature of the subjects to which they must be adapted. Law is, in fact, not an abstract principle of Duty or Right, but a System of applied principles.

The Law of Nations a special science according to De Wolff and Vattel.

§ 80. Barbeyrac, the translator and commentator both of Grotius and of Puffendorf, in combating the notion of a Positive Law of Nations, which he treats as "a chimæra," and in contending that the principles and rules of the Law of Nations are the same as those of the Law of Nature, is constrained to admit that there is a difference with respect to the mode in which those principles are applied in the two Laws[11]. De Wolff developed this doctrine more fully, perceiving that Nations were Composite Bodies, having in their collective capacities a Moral Being of their own, which in its nature and essence differed in many respects from the Moral Being of the individuals which composed the Nation[12]. Vattel followed in the direct track of De Wolff: "A State," he writes, "is a subject very different from an individual of the human race, from which circumstance, pursuant to the Law of Nature itself, there result in many cases very different obligations and rights, since the same general rules applied to two subjects cannot produce exactly the same decisions when the subjects are different, and a particular rule, which is perfectly just with respect to one subject, is not applicable to another subject of quite a different nature. There are many cases, therefore, in which the Law of Nature does not decide between State and State, as it would between Man

[11] Note on Grotius, De Jure Belli et Pacis, L. I. c. 1. § 14.

[12] Jus Gentium, Prolegomena § 3. Alia enim sunt principia Juris Naturæ, alia vero est applicatio eorundem ad Gentes, quæ diversitatem quandam parit in eo, quod infertur, quatenus natura Gentis non est eadem cum natura humana.

and Man. We must therefore know how to accommodate the application of it to different objects, and it is the art of thus applying it with a precision founded on right reason, which renders the Law of Nations a distinct and special Science[13].

Essential difference between Nations and Individual human beings.

§ 81. A Nation is essentially an Independent Political Society, whereas an individual human being is a Dependent Member of a Political Society. It is obvious therefore, that certain principles which may be applied absolutely to the intercourse of Nations by reason of their mutual independence, can only be applied *sub modo* to the intercourse of individual citizens; for instance, the principle of self-preservation is applicable to the mutual relations both of Nations and of individual human beings, but its application results in very different rules in the one case and in the other. Thus a Nation may freely confederate with other Nations against a common neighbour, but the principle of self-preservation may not be carried out in the same absolute manner by the individual members of a Political Society. What would be a perfectly lawful League in the case of Nations, might be an unlawful combination amongst individual citizens. Again, the principle of *suum cuique* is applicable in the most absolute manner to Nations, but its application to the individual members of a Political Society is modified by a variety of considerations arising out of the relations which have been established between the individuals and the Society of which they are members, and is conditional upon its adaptation to those relations.

The Law of Nature.

§ 82. Man is sometimes spoken of as living in a state of Nature when he is living under the rudest forms of physical life, and the law of his existence under such forms is by certain writers laid down to

[13] Droit des Gens, Préliminaires, § 6. [14] Wolff, Prolegomena, § 3.

be the Law of Nature applicable to human beings. Such a view of the Law of Nature would indeed harmonize in substance with the *Jus Naturale of Ulpian*, who defines it to be that Law which Nature teaches all animals.[14] In a still looser sense men speak of the Law of Nature in regard to inanimate things. Thus it is said to be the Law of Nature that vegetables grow with their roots downwards and their stalks upwards, or to use the more accurate language of art, "that a seed in vegetating directs its radicle downwards and its plumule upwards." It is likewise said to be the Law of Nature that matter lighter than water floats upon its surface, as well as that water rises to the level from which it flows. But when men speak of the Law of Nature in this sense, they only mean to denote *an universal fact*, and the conformity of individual cases to the general rule is that which is said to constitute the Law of Nature. Thus the *Jus Naturale* of the Roman Jurists represents little more than a general fact traceable to the instinct of physical life, and the illustration which is given, e. g. *conjunctio maris et fœminæ*,[15] is applicable to the vegetable as well as to the animal world.

Identical Natural Law of Rude and Civilised Nations.

§ 83. The Law of Nature, in the sense in which Writers on International Jurisprudence apply the term, corresponds in the main not with the *Jus Naturale* of the Roman Jurist, but with that division of law which is described in the Institutes[15], as "the law which Natural Reason teaches all mankind." Whether we regard man in a rude state of what is

[14] Jus Naturale, quod natura omnia animalia docuit. Inst. L. I. Tit. 11.

[15] Quod Naturalis Ratio inter omnes homines constituit, id apud omnes perœque custoditur, vocaturque Jus Gentium, quasi quo jure omnes gentes utuntur. Inst. L. I. Tit. 11.

[16] Just. Inst. L. I. Tit. 10.

termed savage life, or in a refined state of what is called civilised society, the one condition being equally *natural* with the other, the law which Reason suggests to him in either case will be equally the Law of Nature. It is accordingly not necessary to adopt a distinction which has been introduced by certain writers upon the authority of Von Ompteda[16] between the Absolute Natural Law and the Modified Natural Law.

Mr. Reddie[17] in commenting upon this subdivision of Natural Law, has happily observed, that the International Law of civilised Nations is as natural, and results as much from the legal relations actually existing in nature amongst those Nations as the International Law of rude Nations, and that as Von Ompteda rests his Modified Natural Law of States upon the general conviction of civilised Nations, there is really no ground for propounding it as a separate species of International Law distinct from what is viewed as the Primary Natural and Necessary Law of Nations.

Growth of the Positive Law of Nations.

§ 84. It was not until the Peace of Westphalia that sufficient materials were forthcoming for reducing into a system the *Positive* or *Instituted Law of Nations.* The principal writers during the Seventeenth Century had treated almost exclusively of the *Natural Law of Nations,* and the followers of Puffendorf, who expounded the Law of Nations entirely from the Law of Nature, were at the end of that Century the predominant school on the Continent of Europe. The contemporaneous English School of International Jurists was, on the contrary, always of a practical character. This was partly attributable to those common causes, whatever they may be, which

[16] Litt. des Volkerrechts, 1758. [17] Inq. in Internat. Law, p. 127.

give a peculiar practical turn to the course of English thought on all subjects, but it was partly due to the existence of a special jurisdiction in England which took cognizance of questions touching the *Jus inter Gentes*. It has been well observed by Mr. Chancellor Kent[18], in reviewing the growth of the existing system of International Law, that "many of the most important principles of public law have been brought into use and received a practical application, and been reduced to legal precision since the age of Grotius and of Puffendorf, and we must resort to the judicial decisions of the Prize Tribunals of Europe and in this country (the United States of North America) for information and authority on a great many points on which all the leading Text-Writers have preserved a total silence." From the Thirteenth to the Sixteenth Century, the controversies of Nations had been adjudged by the rules of the Civil Law, and Albericus Gentilis, the earliest Jurist who rendered any essential service to International Law as a Science, in his Treatise *de Jure Belli*, which appeared in England towards the close of the Sixteenth Century, supports his positions of law by reference to the Civil Law of the Romans, and appeals to the authority of the Commentators on that Law. Grotius himself has recourse to the rules and distinctions of the Roman Law, sometimes as illustrating the application of the principles of Natural Justice, at other times as supplying the best evidence of the usage of mankind, or at least of that which he conceived to be the most civilised portion of it. For instance, Grotius supported his position, that no Nation could acquire rights of property over the sea, so as to exclude others from fishing in it, by reference to the Roman Law, shew-

[18] Commentaries on American Law, Part I. § 71.

ing from the Digest and the Text-Writers, that there had always been a rule founded on common consent in restraint of the Law of Nature with regard to prior occupancy, whereby the open sea was precluded from so being entirely reduced into possession by any Nation, as to found in it absolute and exclusive rights of property. "Wherever this Law of Nations is in force and has not been repealed by common consent, the most inconsiderable part of the sea, nay, though it be almost enclosed by the shore, can never be the property of any particular people."[19]

Study of the Law of Nations in England.

§ 85. The study of the Civil Law in England had always been fostered by the Universities of Oxford and Cambridge, at a time when the Courts of Westminster undervalued and disparaged it, and a privileged career was preserved for the Civilians in the High Court of Admiralty, where a knowledge of the Unwritten Law of the civilised World was of necessity maintained to meet the exigencies of the cases which might come before it. The threefold division of the Law of Nations into Natural, Conventional, and Customary, was adopted as early as the middle of the Seventeenth Century by Dr. Richard Zouch, who was at that time Judge of the High Court of Admiralty, and at the same time Regius Professor of Civil Law at Oxford. His Treatise on Fetial Law, or as he termed it, *Jus inter Gentes*,[20] which appeared within a quarter of a century after the great work of Grotius, although small in bulk, was in substance very complete. His words are precise, "Cum multi diversis temporibus idem affirmant, id ad causam universalem referri debet, quæ alia esse non potest, quam recta conclusio

[19] De Jure Belli et Pacis, L. II. c. 3. § 10. 3.

[20] Juris et Judicii Fetialis, sive Juris inter Gentes, et quæstionum de eodem explicatio, anno 1650.

ex Naturæ principiis proveniens, aut communis aliquis consensus, e quibus illa Jus Naturæ indicat, hic Jus Gentium. Deinde præter mores communes, pro Jure etiam inter Gentes habendum est, id quod Gentes singulæ cum singulis inter se consentiunt; utpote per pacta, conventiones, et fœdera, cum communis reipublicæ sponsio legem constituat, et populi universi, non minus quam singuli, suo consensu obligentur." Dr. Zouch was the first to adopt the expression *Jus inter Gentes* in preference to that of *Jus Gentium*. In later times the Chancellor d'Aguesseau has suggested the substitution of the term *Droit entre Gens* for *Droit des Gens*. Neither of these modifications in the terminology of the Science has taken root, and it was reserved for Mr. Bentham in more modern times to suggest the phrase "International Law,"[21] which bids fair to maintain itself in permanent use.

Courts of the Law of Nations.

§ 86. It has been the peculiar duty of the Tribunals of the Law of Nations to investigate with precision the *Jus Consuetudinarium*, and to separate the fluctuating institutions of particular Nations from the established practice of mankind. "It is my duty," says one of the most distinguished administrators of the Law of Nations, (Lord Stowell,) "not to admit, because one Nation has thought fit to depart from the common usage of the world and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution, merely be-

[21] Heffter considers the term "International Law" not to express the idea of the Jus Gentium of the Roman Jurisconsults. The former he considers to be identical with the external Public Law of States; the latter he holds to embrace the mutual relations of individuals, as well as of States, so far as concerns their respective rights and obligations, having everywhere the same character and effect, independently of all positive institutions, § 1.

cause general theory might give it a degree of countenance independent of all practice from the earliest history of mankind. The institution must conform to the Text-Law and likewise to the constant Usage of the matter, and when I am told that before the present war, no sentence of this kind has ever been produced in the annals of mankind, and that it is produced by one Nation only in this war, I require nothing more to satisfy me that it is the duty of this Court to reject such a sentence as inadmissible."[22] The same accomplished Jurist has also noted on another occasion, how the practice of Nations controls the application of abstract principles. "It has been contended," he says, "that a sentence of condemnation passed before the tribunal of an ally upon a vessel lying in a neutral port is perfectly legal both on principle and authority. It is said, that on principle the security and condemnation of the capture is as complete in a neutral port, as in the port of the belligerent himself. On the mere principle of security it may perhaps be so, but it must be remembered that this is a matter not to be governed by abstract principles alone. The use and practice of Nations have intervened and shifted the matter from its foundation of that species. The expression which Grotius uses on these occasions, *placuit gentibus*, is, in my opinion perfectly correct, intimating that there is an use and practice of Nations, to which we are now expected to conform."[23]

Customary or Consuetudinary Law of Nations.

§ 87. The *Jus Consuetudinarium* of Nations is to be gathered from a variety of sources. Ancient collections of Maritime Usages, such as are to be found in the Consolato del Mare and the Roles d'Oleron supply

[22] The Fladoyen, 1 Robinson's Reports, p. 141.

[23] The Henrich and Maria, 4 Robinson's Reports, p. 54.

evidence of a very early practice. Thus the Rule that enemy's goods found on board of neutral vessels may be captured and condemned as Prize of War is supported by a long established practice, of which evidence has been recorded in the Consolato del Mare, c. 273. On the other hand, a *consuetudo* may be inferred from a succession of Public Treaties, in which exceptions to it have been made for temporary purposes, or in which regulations have been agreed upon as to the manner of enforcing it. Thus there are numerous instances of Treaties since the middle of the Seventeenth Century, whereby Nations bound themselves to make exception towards one another in regard to the practice of confiscating the goods of an enemy found on board of the vessel of a friend. Such exceptions, however, were matters of Treaty-Engagement, and when the Treaty expired, the exceptional engagement ceased, and the general rule came into operation again. So likewise the *consuetudo* under which the Sound Dues were levied by Denmark upon all vessels passing into or out of the Baltic by the narrow seas of the Sound or the Belts, was matter of inference, as against the Nations of Europe, from a series of Treaties commencing in the Fourteenth Century, in which the European Powers have tacitly admitted the right of Denmark to levy tolls by negociating for and agreeing to a tariff of the tolls. Again, a *consuetudo* may be directly recognised by the European Powers in a formal Convention, such for instance as the Convention of London 13 July, 1841, whereby the Five Principal Powers of Europe recognised the ancient Rule of the Ottoman Porte to keep the passage of the Straits of the Dardanelles closed against foreign vessels of war, whilst the Ottoman Porte is at peace, and declared their unanimous de-

termination to conform themselves to it. Again, a *consuetudo* may be inferred from the Ordinances of Princes on matters touching their relations with other Powers, where an uniformity of principle is observed to pervade them, and their enactments *in pari materia* are identical.

Relations with non-Christian Powers exceptional.

§ 88. Savigny[24] has observed, that "there may exist between different Nations a common consciousness of Right similar to that which engenders the Positive Law of a particular Nation. The foundation of this community of feeling rests partly on a community of origin, partly on common religious convictions; and upon this Community of feeling has been built up a Positive Law of Nations, as it especially exists amongst the Christian States of Europe. But this Positive Law of Nations, in his opinion, is only imperfect Positive Law; partly, on account of its indeterminate character; partly, because it has not that solid basis which the Power of the Government and the authority of the tribunals gives to the Positive Law of particular States. The progress of Civilisation, grounded on Christianity, has led the Nations of Europe to observe a rule analogous to this Positive Law of Nations in their dealings with Non-Christian Powers, from whom they do not always expect a similarity of conduct; but this extended application of the rule is of a purely moral character, and is not in the nature of Positive Law." The Consuetudinary Law of Christendom has been accordingly not invoked as the governing rule of intercourse between Christian and Mahommedan Powers with the same absoluteness as between Christian Powers. In matters however of *substance*, and where a primary question of International Right is

[24] System des heutigen Römischen Rechts, L. I. c. II. § II.

involved, the European Powers have enforced against the Ottoman Porte and her dependencies on the Barbary Coast, the same rule of conduct which has been accepted amongst Christian Nations. "On many accounts," says Lord Stowell, "they are undoubtedly not strictly considered on the same footing as European Merchants; they may on some points of the Law of Nations be entitled to a very relaxed application of the principles established between the States of Europe, holding an intimate and constant intercourse with one another. It is a Law made up of a good deal of complex reasoning, although derived from very simple rules, and altogether composing a pretty, artificial system, which is not familiar to their knowledge or their observance. Upon such considerations, the Court has on some occasions laid it down that the European Law of Nations is not to be applied in its full vigour to the transactions of persons of the description of the present claimants, and residing in that part of the world, (i. e. Mahommedan merchants resident in the kingdom of Morocco.) But on a point like this, the breach of a blockade, one of the most simple and universal operations of war in all ages and countries, excepting such as are merely savage, no such indulgence can be shewn. It must not be understood by them, that if an European army or fleet is blockading a town or port, they are at liberty to trade with that port. If that could be maintained, it would render the obligation of a blockade perfectly nugatory. They in common with all other Nations must be subject to this first and elementary principle of blockade. It is not a new operation of war; it is as old and general as war itself. The subjects of the Barbary States could not be ignorant of the general rules applying to a

blockaded port so far as concerns the interests and duties of neutrals[25]." But in a matter of *form* which involved only a secondary question of International Right, the same eminent Jurist upheld the transfer of a ship which had been captured by an Algerine Cruiser, and subsequently sold *bonâ fide* to a Christian Merchant, although it was not established that the ship had been formally condemned by the sentence of a Prize tribunal. The Court presumed from the fact that the sale was authorized by the State, and as no remonstrance had been made against it by the owner of the vessel, that there had been adequate grounds for the confiscation of the vessel according to their notion for some breach of Treaty-Regulations, "as it is by the Law of Treaty only that these Nations hold themselves to be bound, conceiving (as some other people have foolishly imagined) that there is no other Law of Nations, but that which is derived from Positive Compact and Convention[26].

The Diplomatic Science.

§ 89. The Conventional Law of Nations is sometimes spoken of as the Diplomatic branch of the Law of Nations, and Diplomacy, in accordance with this view, is the Science which is conversant with Negotiations and Treaties. This distinction has not been hitherto noted, and Diplomacy has been in general regarded merely as an Art. It must be admitted that the practice of Sovereigns in the selection of Diplomatic Envoys has given some colour to the prejudices of mankind against the very name of Diplomacy; and an able Diplomatist has come to be a proverbial designation for a skilful negotiator, who can bring about an arrangement *quocunque modo* in favour of the party whose interests he represents.

[25] The Hurtige Hane, 3 Robinson's Reports, p. 325.
[26] The Helena, 4 Rob. p. 4.

But Diplomacy as a Science has higher ends in view, and the true art of the Diplomatist is shewn in easing the friction of International intercourse, and in smoothing the difficulties which may occasionally embarrass that intercourse, either by a candid interpretation of existing Treaty-engagements, or by negociating the adjustment of a fluctuating practice upon a sound basis of Conventional Law. For this purpose however, the Diplomatist requires not merely a technical knowledge of the general rules which govern the intercourse of Nations, but a perfect acquaintance with the principles involved in those rules, and which must be respected in the application of them; and it is indispensable for his success in administering the Law of Nations, that he should have mastered the elements of its Philosophy.

Conventional Law of Nations.

§ 90. "Treaties," it has been well observed by an American Statesman, "may be considered under several relations to the Law of Nations according to the several questions to be decided by them. They may be considered as simply repeating or affirming the General Law[27]: they may be considered as making exceptions to the General Law, which are to be a particular Law to the parties themselves: they may be considered as explanatory of the Law of Nations on points where its meaning is otherwise obscure or unsettled, in which case they are first a Law between the parties themselves, and next a sanction to the General Law, according to the reasonableness of the explanation, and the number and character of the parties to it: lastly, treaties may be regarded as forming a voluntary or positive Law of

[27] The preambles or recitals of Treaties furnish sometimes valuable evidence in this respect, when they are against the interest of the party who makes them. Edinburgh Review, LXXVII. p. 312.

Nations. Whether the stipulations of a treaty are to be considered as an affirmance, or an exception, or an explanation, may sometimes appear upon the face of the treaty; sometimes being naked stipulations, their character must be determined by resorting to other evidences of the Law of Nations. In other words, the question concerning the Treaty must be decided by the Law, not the question concerning the Law by the Treaty[28]." Mr. Madison's observations in the above passage are valuable, as they show that treaties may be operative in very different ways. For instance, the effect of a treaty, if it is of a restrictive character, must be limited to the parties between whom the compact is made; if on the other hand it should be of a beneficial character, and should relax the rigour of the customary Law in their mutual favour, its operation may extend to other Nations. But this indirect result will depend not upon the force of the Convention as a Contract, for *that* only binds the parties to it, but on certain considerations of Right (Jus) *dehors* the treaty; and which may involve the nicest questions of International Jurisprudence.

Views of Martens and others contrasted.

§ 91. Mr. Reddie, in his Inquiries in International Law[29], has suggested, that German writers generally, and particularly Martens and Klüber, have, in framing or constructing the science which they have denominated *Droit des Gens Moderne de l'Europe*, ascribed too much to express Conventions or Treaties, as sources of this Law. Their language[30] is considered by him to imply, that besides the obligation which Treaties impose upon the immediate parties to the

[28] Madison's Examination of the British Doctrine, London, 1806, p. 39.

[29] Reddie, Inquiries in International Law, pp. 157, and 339.

[30] Martens, Précis du Droit des Gens, Introduction, § 7. Klüber, Droit des Gens, § 2.

contract, some more General Law may be gathered from them, resulting from a concurrent mode of contracting, which will be binding upon Nations which are not parties to the treaties. "It is obvious, however, that no Common or General Law of Nations can be derived from the particular Treaties or Conventions of Nations, however similar they may be. Those treaties can be used for the construction of the Science, only in order to ascertain what has been propounded or recognised in them as their basis, and that basis is nothing else than Custom or Usage." Such is the reply which is given by an opposite school of writers represented by the Prussian Privy Councillor Schmalz[31], and the anonymous author of the Traité Complet de Diplomatie. The former writer observes that Leibnitz, whose Codex Diplomaticus may be regarded as the foundation of the Diplomatic Science, "commenced his collection of treaties not with the idea that the contents of these treaties would supply a body of International Law, but because there would be found in them preeminently what principles the European Powers have recognised as right and just, or what they have pronounced or held to be so recognised, and to be unquestionable." The author of the Traité Complet de Diplomatie in a similar manner says, "Cependant il est évident, qu'on ne sauroit former un droit positif de l'ensemble des Conventions particulières des peuples, quelque semblables qu'elles fussent. Ces pactes ne peuvent servir de matériaux pour édifier la science, s'ils ne montrent ce que l'on y a reconnu pour base; et cette base n'est autre chose, que la coutume[32]."

31 Schmalz, Europaïsches Völkerrecht, B. I. § 10. and § 28.

32 Traité Complet de Diplomatie, T. I. p. 41.

The difference is important between these two schools of Jurists. The former regard the principles as commending themselves to our acceptance by reason of their recognition in the treaties; the latter consider the treaties to demand our respect, so far as they furnish evidence of a very general and long prevailing usage.

Ortolan's view of the effects of Conventions on General Law.

§ 92. M. Ortolan in his work on the Diplomacy of the Sea[33], has combated Mr. Reddie's criticisms, and has vindicated the doctrine of Martens and Klüber, from what he considers to be a misapprehension of its true import. M. Ortolan holds that those eminent publicists did not pretend that the stipulations of a particular treaty could be a rule binding upon any but the parties to it, but that a series of treaties concluded at different epochs between different civilised Nations, exhibited an uniformity of principle in their stipulations, from which a theory of what is generally practised amongst Nations may be formed by abstraction, and this theory constitutes *the Conventional Law of Nations*. M. Ortolan then proceeds to cite a passage from one of the authors criticised by Mr. Reddie, in which it is contended that "the principle which is established in the greatest number of treaties ought to be regarded as the rule, and that which is found in the least number as the exception. That the question in dispute ought to be decided according to the principle contained in the greatest number of treaties, particularly if the greatest number are at the same time the most recent. For it may be inferred from this circumstance, that Nations have gradually abandoned an old principle for a new principle, and that

33 Règles Internationales et Diplomatie de la Mer, Tom. II. Appendice, p. 442.

by a change of principles they have worked a change in the Law of Nations."

Wheaton's earlier and later views.

§ 93. Wheaton, in a similar manner, in the earlier editions of his Elements of International Law, seems to have been inclined to assign to treaties too important a part in the formation of General International Law. "The effect of Treaties and Conventions between Nations," he observes, "is not necessarily restricted, as Rutherforth has supposed, to those States which are direct parties to these compacts. They cannot, indeed, modify the original and preexisting International Law, to the disadvantage of those States which are not direct parties to the particular treaty in question. But if such a treaty (1) *relaxes the rigour of the primitive Law* of Nations in their favour, or (2) is merely declaratory of the preexisting Law, or (3) furnishes a *more definite rule* in cases where the practice of States has given rise to conflicting pretensions, *the Conventional Law thus introduced is not only obligatory as between the contracting parties, but constitutes a rule to be observed by them to all the rest of the world*[34]. In support of this view, Wheaton refers to his History of the Law of Nations, and the remarks therein contained upon the Maritime Convention concluded in 1801 between Russia and Great Britain, which put the seal to the dissolution of the Second Armed Neutrality of the Baltic Powers.[35]

Convention of 1801 between Russia and Great Britain.

A difficulty at once suggests itself in the way of the first and third of Wheaton's positions, namely, that as International obligations are under the Common Law of Nations reciprocal, if a State under

[34] Elements of International Law, third edition, Philadelphia, 1846, part I. c. 1. s. XVI. § 7.

[35] History of the Law of Nations, p. 14. § 9. pp. 408—420.

treaty-engagements with one Power, which come under either of those heads, is bound by the Common Law of Nations to observe the rule which accords with those treaty-engagements, not merely in its intercourse with that Power, but in its intercourse with all other Powers, those other Powers will be bound to reciprocate the rule, and they will thus be indirectly involved in engagements to which they are not consenting parties. This anomaly will be still more striking in the case, where the treaty-engagements are on a subject, "where the practice of different States has given rise to conflicting pretensions," and the States which are not parties to the treaties should be those which pursue a different practice from that, which the treaty has introduced between the contracting parties.

Illustration as to Contraband of War.

§ 94. In regard to Wheaton's second position, the Law of Contraband of War may be referred to by way of illustrating his mode of applying the principle. By the third section of the third Article of the Convention of 1801, Great Britain and Russia agreed to the same definition of Contraband of War which had been agreed upon between the two Powers in the temporary Convention of 1797. Wheaton[35] observes that this section does not contain "the concession of any special privilege to be thenceforth enjoyed by the contracting parties only, but the *recognition of an universal and preexisting right*, which, as such, could not justly be refused to any other Independent State," and that "it must be taken as laying down a general rule for all further discussions with any power upon the subject of Military and Naval Stores, and as establishing a principle of law which was to decide universally on a just interpre-

[35] History of the Law of Nations, p. 415, 416.

tation of the technical term of Contraband of War." The doctrine of Bynkershoeck[36] does not harmonize with Wheaton's view, for Bynkershoeck holds, that there is a Common Law of Nations as to Contraband of War, which has been deduced from reason and usage, and *the usage of mankind* is evidenced by the tenor of an almost perpetual series of treaties and ordinances on the subject. Bynkershoeck's doctrine.

There is also a reservation contained in the concluding part of the third Section of the third Article of the Convention of 1801, which seems to be irreconcilable with Wheaton's Interpretation. It is agreed that the stipulations of the present Article shall not prejudice in any way the particular stipulations of either Crown with other Powers; whereby objects of a like kind shall be reserved, prohibited, or permitted[37]! Wheaton considers this clause to apply only to subsisting treaties, and contends that its insertion countenances his construction of the Article, inasmuch as it was necessary for Great Britain, when she undertook to lay down an universal principle, applicable to all her transactions with every Independent State, to reserve the *more favourable* practice which her *subsisting* treaties had established with some other Powers. But the words of the Article seem to bear a more extensive meaning, and apply rather to *contingent* than to *subsisting* treaties, and are not limited necessarily to treaties more favourable to

[36] Questiones Juris Publici L. I. c. 10. "Dixi ex perpetuâ quodammodo consuetudine paciscendi edicendique, quia unum forte alterumve pactum quod a consuetudine recedit, jus Gentium non mutat."

[37] "Il est aussi convenu, que ce qui est stipulé dans le présent article, ne portera aucune préjudice aux stipulations particulières de l'une ou de l'autre couronne avec d'autres puissances, par lesquelles des objects de pareil genre *seroient réservés, prohibés* ou *permis*." Martens, Recueil, VII. p. 262.

Great Britain, as it speaks of Treaties which should *permit*, as well as of those which should *prohibit* similar objects.

It was unnecessary for the two Powers to declare that this treaty should not prejudice the *subsisting* treaties of Great Britain with other powers, excepting *ex majori cautelâ*, to prevent any possible question between them on the subject; for Great Britain could not set aside, under any circumstances, her Treaties with other Powers on the subject of Contraband of War, on the grounds that she had concluded a Treaty on other terms with Russia. On the other hand, this *proviso* would have been idle, had there been any principle of the Common Law of Nations which entitled any third Power to insist upon Great Britain and Russia observing towards itself a rule which accorded with their particular Treaty-engagements. In further illustration of the untenable nature of Wheaton's positions in regard to the particular subject of Contraband of War, the practice of Nations may be appealed to. Thus Great Britain during the war of the Spanish Succession made a Treaty with Denmark, under which ship-timber was recognised between the Two Powers as Contraband of War, and not to be imported into the enemy's ports. France, being at such time at war with England, did not claim from Denmark, under the Law of Nations, the observance of a like rule in her favour, but insisted upon Denmark concluding an analogous Treaty with the French Crown. Such a measure would have been unnecessary, if the Law of Nations had bound Denmark to observe the same rule as to Contraband of War towards the enemies of other Powers with which she was at amity, as she had engaged herself by Treaty with Great Britain to observe towards the enemies

of that Power. Yet there is no subject which concerns so intimately the interests of every Member of the Family of Nations, as the rights and obligations of Neutrality. Again, if the rule of Law was such as has been suggested by Wheaton, we should not find a special provision in treaties to the effect that the contracting parties shall grant to each other the same immunities and privileges which they should grant to any other Nation, in other words, what is termed "the most favoured Nation clause." But this subject will be more fully discussed when we come to speak specially of Conventions. Meanwhile it may be useful to remark, that the Plenipotentiaries of the Seven Powers assembled in Congress at Paris on 16th April, 1856, who signed the Declaration respecting Maritime Law in time of War, with a view to establish an uniform doctrine and more beneficial practice, agreed to bring it to the notice of the States which did not take part in the Congress, and to invite them to accede to it. The Declaration was meanwhile to be binding only between the Powers who had acceded to it. But this *proviso* is idle, if Wheaton's Theory be correct, that the Conventional Law thus introduced, seeing that it relaxes the rigour of the primitive Law of Nations, and at the same time furnishes "a more definite rule in a case where the practice of states has given rise to conflicting pretensions," is not only binding on the contracting parties, but "constitutes a rule to be observed by them to all the rest of the world." The United States of North America, for instance, have been formally invited to accede to the Convention of Paris, but they have declined so to do, unless the European Powers will agree to modify still further their practice as to Prize of War on the High Seas. The remaining

Declaration of Maritime Law at Paris, 16 April, 1856.

Powers of Europe who were not parties to the original Declaration, have since formally acceded to it[38].

Preambles and Recitals of a Declaratory Character.

§ 95. There may be exceptional cases in which articles of a Declaratory character are inserted in the Text of Public Acts of an International character, by the side of articles which are strictly the foundation of a Contract, and those Declaratory articles may apply to all Nations. Thus in the Final Act of the Congress of Vienna (9 June, 1815) several Declaratory Acts of one or more of the Powers assembled in Congress were in substance incorporated in the form of Articles, or formally recognised as if annexed *in extenso*. Amongst these the 109th Article may be specially referred to as *expressly* applicable to all Nations, which declares the navigation of all rivers, which traverse or separate the territories of the Powers which have signed the Treaty, to be *free to all the world*. "La navigation dans tout le cours des rivières indiquées dans l'article précédent, du point où chacun d'elles devient navigable jusqu'à son embouchure, sera entièrement libre, et ne pourra, sous le rapport de commerce, être *interdite à personne*, bien entendu que l'on se conformera aux réglemens relatifs à la police de cette navigation, lesquels seront conçus d'une manière uniforme pour tous, et aussi favorable que possible au commerce de toutes les Nations."[39] The Regulation, on the other hand, respecting the

[38] It is most satisfactory to find, that in the last (sixth) edition of Wheaton's Elements, (Boston, 1857,) edited after his death by Mr. William Beach Laurence, the objectionable doctrine which has been discussed in the preceding sections is no longer maintained. The passages which appear in the earlier editions, and which contain the reference to Mr. Rutherforth's work, as well as Wheaton's three positions, are discarded, and their place is supplied by some general remarks which are more in accordance with the doctrine of Bynkershoeck.

[39] Martens, Nouveau Recueil, II. p. 427.

rank of Diplomatic Agents which was incorporated in the General Act,[40] is an instance of a provision *virtually* applicable to all Nations, but the Powers which agreed to the Regulation were extremely careful to disclaim any right to impose it upon other Powers. Again, in the Treaty of Paris, (30 March, 1856), Article XV is to this effect: "The Act of the Congress of Vienna having established the principles intended to regulate the navigation of rivers which separate or traverse different States, the Contracting Parties stipulate amongst themselves that those principles shall in future be equally applied to the Danube and its mouths. They declare that this arrangement henceforth forms *part of the Public Law of Europe*, and take it under their guaranty."

Objections to the idea of any Law, as such, between Nations.

§ 96. Certain writers, both in England and in France, have expressed a doubt how far the Rules of conduct which prevail amongst Nations can properly be regarded or spoken of as Laws, on the ground that they are not prescribed by any superior Power. Thus Mr. Austin says,[41] "that the Law of Nations obtaining between Nations is not Positive Law, for every Positive Law is set by a given Sovereign to a person or persons in a state of subjection to its author." He observes further, that, "the law obtaining between Nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions; by fear on the part of Nations, or by fear on the part of Sovereigns of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected." Mr. Austin accordingly considers that the science which is conversant with the positive rights and obligations

[40] Art. CXVIII.

[41] Austin on Jurisprudence, p. 208.

of Nations should be styled the science of Positive International Morality. To a similar effect M. de Rayneval writes[42], "there can be no right (droit) where there can be no law (loi), and there is no law where there is no Superior; without law, obligations, properly so called, cannot exist; there is only a moral obligation resulting from natural reason; such is the case between Nation and Nation." He further says, that "law is a rule of conduct, deriving its obligation from sovereign authority, and binding only on those persons who are subject to its authority. Nations being independent of one another acknowledge no Sovereign from whom they can receive the Law (loi), and all their relative duties result from right or wrong, from convention or usage, to none of which can the term Law be properly applied."

International Morality distinct from the Law of Nations.

§ 97. It is however not a valid objection to the existence of juridical relations between Nations, that they are not, like the domestic law of a State, defined by the Sovereign Power, or that they are not enforced by the executive authority of a political Superior. If those relations can be accurately defined howsoever, and can be enforced at all, they are not merely relations of Morality, but relations of Law. The History of the European Law of Nations shews that the more powerful Nations have, as occasion required, used their individual strength to enforce its rules, and that the less powerful Nations have combined their forces from time to time, and by their united strength compelled the more Powerful States to respect them. Such leagues for the enforcement of the reciprocal rights and obligations of Nations have been the means of maintaining a Balance of Power amongst the European

[42] De Reyneval, Institutions du droit de la Nature et des Gens, L. I. p. 8. n. 10.

Nations, whereby the independence of the weaker states is protected from aggression, and the observance of settled rules of intercourse amongst Nations is secured. Wherever a Rule of Conduct is thus capable of being enforced it ceases to be a mere Rule of Morality, binding on the *conscience of men*, and may in contradistinction be termed without risk of confusion a *Rule of Law.*[43] There are, however, many questions between Nations which involve matters of International Morality, and the Rules of International Morality[44] are supplemental to the Rules of International Law. Law may prevent wrong, but it cannot always secure right, and Morality here steps in to the aid of Law between Nations, precisely as it comes to the aid of Law between individual human beings. Mr. Chancellor Kent has well observed, "that the Law of Nations is a complex system, composed of various ingredients; it consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality, and to the relation and conduct of Nations; of a collection of usages and customs, the growth of civilisation and commerce; and a code of Conventional and Positive Law. In the absence of these latter regulations, the intercourse and conduct of Nations are to be governed by principles fairly to be deduced

43 It appears to be a well founded distinction between *Law* and *Morality*, that wherever the sanctions of a rule of conduct are *Physical*, namely, wherever the sanction is fear of injury to person or property, the rule may be properly ranked under the head of Law; where the sanctions of a rule of conduct are only to be discovered in the human conscience, it is a rule of Morality as distinguished from Law.

44 Mr. Senior proposes to distinguish the Natural Law of Nations by the term International Morality, and to confine the term International Law to the rules of conduct, whether consistent or not with International Morality, which are sanctioned by the public opinion of Nations. Edinburg Review, LXXVII. p. 306.

from the rights and duties of Nations and the nature of moral obligations; and we have the authority of lawyers of antiquity, and some of the first masters in the modern school of Public Law, for placing the moral obligations of Nations and of individuals on similar grounds, and for considering individual and national Morality as parts of one and the same Science."[45]

45 Kent's Commentaries of American Law. Part I. Lecture 1.

CHAPTER VI.

RIGHT OF SELF-PRESERVATION.

Absolute and Conditional Rights of Nations—Right of Self-Defence—Treaty Limitations of such Right—Right of Self-Aggrandisement—Right of anticipating Attack—Right of Confederation—The Balance of Power.

Absolute and Conditional Rights of Nations.

§ 98. EVERY Nation has certain rights with regard to other Nations, which pertain to its moral being as an Independent Political Body, and the enjoyment of which is indispensable to its existence as such. These Rights may be termed Primary and Absolute Rights[1], as they are coordinate with the Being of a Nation, and are not dependent upon particular conditions of International Life. There are other rights to which all Nations are entitled, but not under all circumstances, which arise out of the intercourse of Nations with one another, and which cease with the circumstances which give rise to them. These may be distinguished as Secondary or Conditional Rights, some of them being incident to a state of amity, others being coincident only with a state of war. The Primary or Absolute Rights of Nations rest upon a foundation of Moral Truth, "the proofs of which are to be referred to some such certain notions," to use the language of Grotius[2], "as none can deny without doing violence to his own judgment." The Secondary or Conditional Rights rest upon a basis of historical fact. The former are inseparably connected with the free Moral agency of Independent Political Bodies, the

[1] Klüber § 36. Wheaton, Elements, pt. II. c. 1. § 1.
[2] De Jure Belli et Pacis, Prolegomena, § 39.

latter have grown up with the exercise of that free Moral agency, and with the mutual recognition of its consistency with the varying circumstances of International intercourse.

Right of Self-Defence.

§. 99. Of the Primary or Absolute Rights of a Nation the most essential, and as it were the Cardinal Right, upon which all others hinge, is that of Self-Preservation. This Right necessarily involves, as subordinate Rights, all other Rights which are essential as means to secure this principal end. Amongst these, the foremost is the Right of Self-Defence. An Independent Political Society, which is not in a condition to repel aggression against its Territory, or against the Persons or Property of its Members, is unequal to the object of its Institution. "The Nation," writes Vattel[3], "ought to put itself in such a state as to be able to repel and humble an unjust enemy. This is an important duty which the care of its own perfection and even its Self-Preservation imposes both on the State and on its Conductor." Hence a Nation is entitled, consistently with the maintenance of peaceful relations towards other Nations, to fortify its Territories, to train up its Population generally in the use of arms, to maintain a portion of its Population under arms, in the form either of a standing army or a permanent war-navy, to equip itself with stores and munitions of war, and to form defensive alliances with other Nations. The presumption of Natural Law is, that all measures of this kind which do not endanger the safety of other Nations, are undertaken *bonâ fide* for the security of National Independence, and the exercise of the Natural Right of a Nation in these matters is only controlled *de jure* by the equal and corresponding Rights

3 Droit des Gens, L. I. c. 14. §177.

of other Nations. "A Nation," writes Vattel[4], "is sufficiently powerful, when it is capable of causing itself to be respected, and of repelling whoever would attack it." Within these limits no Nation is bound to give account of its conduct to any other Nation. But the equal and corresponding Rights of other Nations come at once into play, if a Nation should increase its armaments to an extraordinary extent. Under such circumstances, any other Nation, in pursuance of its own right of Self-Defence, may ask for explanation, if it either sees in the armaments of its Neighbour immediate occasion for alarm, or anticipates possible danger to itself or its Allies. A refusal to furnish explanation, when it has been asked for in a courteous tone, and with an amicable spirit, will justify counter-armaments, and may sometimes even justify immediate measures of hostile repression[5].

Treaty Limitations of Right of Self Defence.

§ 100. Exceptional cases occur *de facto*, in which the limits, within which a Nation may lawfully exercise its Right of Self Defence, have been narrowed by special conventions freely entered into with other Nations.

Thus the exercise of the Right of a Nation to fortify its territory has been sometimes limited by treaty-engagements. In such cases the exercise of that Right by the erection of fortifications of a particular kind has been deemed to be inconsistent with the safety of another Nation. Thus by the Treaty of Utrecht, (anno 1713,) confirmed by the subsequent treaties of Aix-la-Chapelle, (anno 1748,) and of Paris, (anno 1763,) France engaged herself to Great Britain not to fortify the town of Dunkirk towards the sea, as such

4 Droit des Gens, L. I. c. 14. § 185.

5 Klüber, Droit des Gens, § 40; Martens, Précis, § 117, 118; Wheaton's Elements, part II. c. 1.

fortifications were deemed by Great Britain to be inconsistent with her just security. By the treaty of Luneville[6], (anno 1801,) France restored to the Princes of the Germanic Empire all the conquests which her armies had made on the right bank of the Rhine, on the express condition however, that the ceded fortresses should continue permanently in the state, in which they were at the time of their evacuation by the French armies. By the Treaty of Paris, (anno 1815[7],) France engaged herself to the Allied Powers not to rebuild the Fortifications of Huningen, which had been a source of disquietude to the City of Bâsle, and not to replace them by any other Fortifications at a distance of less than three miles from that city. Again, the exercise of the Right of a Nation to maintain a portion of its population under arms, has been subjected to limitation by treaty-engagements, more particularly with regard to a war navy. Thus the Genoese in their Treaty with France, (anno 1683,) undertook to reduce the number of their vessels of war in commission, and the Ottoman Porte and Russia have respectively engaged themselves to the European Powers who signed in conjunction with them the Treaty of Paris[8], (anno 1856,) by a joint Convention annexed to and declared to be a part of that Treaty, not to maintain severally more than ten vessels of war of a limited tonnage on the waters of the Black Sea.

Right of Self Aggrandisement.

§ 101. A Nation is not entitled to oppose itself to the territorial aggrandisement of another nation, unless that aggrandisement be actually prejudicial to its rights, or visibly threatens to become so[9]. War is not

[6] Martens, Recueil, vii. p. 296.
[7] Martens, Nouveau Recueil, II. p. 682.
[8] Martens, N. R. Gén. XV. p. 786.
[9] Grotius de Jure Belli et Pacis, L. II. c. 1. § 17. Wolff, Jus Gentium, § 640.

justifiable on any other ground than that of repelling actual assault, or of preventing intended aggression. A Nation, which by any just means enlarges its dominions by the incorporation of new Provinces with the free will of their inhabitants, or by the occupation of vacant territory to which no other Nation can lay claim, is pursuing the legitimate object of its Being, as a Political Society instituted for the promotion of the common welfare of its members[10]. "A State," writes Vattel, "that increases her power by all the acts of good government, does no more than what is commendable: she fulfils her *duty towards herself* without violating those which she owes to other Nations[11]." The right of every Independent State," writes Mr. Wheaton, "to increase its national dominions, wealth, population, and power, by all innocent and lawful means—such as the pacific acquisition of new territory, the discovery and settlement of new countries, the extension of its navigation and fisheries, the improvement of its revenues, arts, agriculture, and commerce, the increase of its military and naval force—is an incontrovertible right of Sovereignty, generally recognised by the usage and opinion of Nations." All writers on Public Law[12] agree that an increase of Power cannot alone, and of itself, give any Nation a right to take up arms in order to oppose it. The internal development of the resources of a country, although the increase of its population and wealth is the surest means of augmenting its power, has never yet been considered a just cause of alarm to other Nations, for such augmentation is in perfect accordance with the moral end of a Nation's Being,

10 Klüber, § 41.

11 Droit des Gens, L. III. c. 3. § 42.

12 Elements of International Law, pt. II. c. 1. § 3.

and, being gradual, is not suggestive of any evil intention towards others. In the same way the settlement of Colonies in distant lands, and the acquisition of Dependencies in remote quarters of the world, have been regarded as legitimate means of external development, which a Nation may pursue without giving to other Nations just cause of apprehension for their own safety. It would be contrary to Morality for Nations to combine for the purpose of retarding the innocent growth of the power of a State, which owing to the superior merits of its Political Institutions, or through the enlightened guidance of wise rulers, is enabled to advance more rapidly in the career of civilisation than its neighbours, and, as a consequence of such advance, to attain to greater material prosperity. The usage of Nations in this respect accords with the dictates of right Reason.

Right of anticipating attack.

§ 102. On the other hand, an increase of power, if it be accompanied by the will to abuse that power, creates good ground for alarm, and may justify a recourse to arms.[13] "A Nation," writes Vattel, "which has a neighbour at once powerful and ambitious, has her all at stake. As men are under the necessity of regulating their conduct in most cases by probabilities, those probabilities claim their attention in proportion to the importance of the subject; and, to make use of a geometrical expression, their right to obviate a danger is in a compound ratio of the degree of probability and the greatness of the evil threatened. If the evil in question be of a supportable nature, if it be only some slight loss, matters are not to be precipitated; there is no great danger in delaying our opposition to it, until there be a certainty of our being threatened. But if the safety of the

[13] Wolff, Jus Gentium, § 651, 652.

State lies at stake, our precaution and foresight cannot be carried too far."[14] Accordingly, as experience shews that there is in human nature a tendency to abuse power wherever it may be done with impunity, the circumstance that the possession of power is generally accompanied with the will to abuse it, entitles a State, when its safety is at stake, to treat the first appearance of such a combination of power and will as a sufficient warning.[15] Further, if a Nation has exhibited unmistakable signs of undue ambition or rapacity, she becomes an object of suspicion to her neighbours, whose duty it is to stand their ground against her, and if she is at any moment on the point of acquiring a formidable accession of power, they may demand securities from her, and if she hesitates to give them, they may prevent the probable danger to themselves by force of arms[16]. When the safety of the State is at stake, the Right of Self-Preservation may warrant a Nation in extending its precautionary measures beyond the limits of its own dominions, and even in trespassing with that object on a neighbour's territory. As the Right of Self-Preservation is prior and paramount to the Right of Dominion and Property in the case of individuals, so the Right of Self-Preservation is prior and paramount to the Right of Territorial Inviolability in the case of Nations,[17] and if ever these Rights conflict, the former is entitled to prevail within the limits of the necessity of the case.[18] Thus, if a Nation takes possession

[14] Droit des Gens, Lib. III. c. 3. § 44.

[15] Potentia igitur crescens in hoc casu non modo inter rationes suasorias locum habet, sed in ipsas quoque justificas influit, quatenus abusus potentiæ non amplius dubius. Wolff, § 650.

[16] Vattel, L. III. c. 3. § 49, 50.

[17] Phillimore, Tom. I. § 213.

[18] Genti unicuique competit jus ad ea quibus periculum interitus avertere et eà, quæ interitum afferre possunt, vitare potest, quantum datur. Wolff, Jus Gentium, § 34.

of another Nation's territory with a view to conduct hostile operations against a third Nation, the third Nation may in virtue of its Right of Self-Preservation lawfully pass the frontier of the territory which has been so occupied, for the purpose of dislodging its enemy from it. Urgent and indisputable danger may even authorise a Nation, to occupy the territory of a neutral Nation in order to prevent the execution of an enemy's intention to occupy it for the purposes of carrying on its hostilities with greater advantage, whenever the Nation to which the territory belongs is unable or unwilling to defend it. But the exercise of this Right, which Klüber[19] regards as a Right of Necessity, entails the obligation to make compensation to the neutral State for any damages which may have accrued to it.[20]

Right of Confederation.

§ 103. Two or more Nations have a right to unite themselves into one Independent Political Body, so as to become one Nation, provided, the views, by which they are so actuated, be not prejudicial to other Nations. But if each of the Nations in question be able separately and without assistance to govern and support itself, and to defend itself from insult and aggression, it may be reasonably presumed, that the object of their union is to obtain dominion over their neighbours, and on occasions where it is impossible or too dangerous to wait for an absolute certainty, other Nations will be justified in acting on a reasonable

[19] Klüber, Pt. II. § 44.

[20] Extreme necessity may even authorise the temporary seizure of a neutral town, and the putting a garrison therein, with a view to cover ourselves from the enemy, or to prevent the execution of his designs against that town, when the sovereign is not able to defend it. But when the danger is over, we must immediately restore the place, and pay all the charges, inconveniences, and damages, which we have occasioned by seizing it. Vattel, L. III. c. 3. § 122.

presumption, and may forthwith have recourse to measures of Self-Defence. On these grounds, Vattel[21] maintains, that the Nations of Europe would have been justified in combining together against Louis XIV of France, if he had attempted to unite the Monarchy of Spain to that of France; for to have tamely suffered an union of the two Monarchies in the person of a Prince who had already given proofs of imperious pride and insatiable ambition, "would have been, according to all the rules of human probability, equivalent to surrendering the rest of Europe into servitude, or at least would have rendered the condition of each European State too critical and precarious to be endurable by Independent Political Bodies. The safety, therefore, of the other Nations of Europe would have justified them in opposing by anticipation such a formidable accession to the power of so ambitious a Prince." The right is still clearer if a formidable Power should betray an unjust and ambitious disposition, by doing the least injustice to another Power.[22] "In such a case, all Nations may avail themselves of the occasion," writes Vattel, "and by joining the injured Party thus form a Coalition of strength, in order to humble the ambitious Potentate, and disable him from so easily oppressing his neighbours, or keeping them in continual awe and fear. For an injury gives to the injured Party a right to provide for his future safety by depriving an unjust Aggressor of the means of doing injury, and it is lawful and even praiseworthy to assist an injured Party, and to aid him in obtaining redress and in protecting himself from injury."[23] The supreme arbitrator between Nations is the sword, but force of arms is not

[21] Droit des Gens, L. III. c. 3. § 44.

[22] Wolff, Jus Gentium, § 651.

[23] Vattel, L. III. c. 3. § 45.

the only expedient by which Nations may guard themselves against a Formidable Power. There is a moral sanction to the mutual duties of Nations, in the fear of provoking general hostility and incurring its probable evils, in case a Nation should violate the Common Law; and these mutual sanctions are enhanced by the formation of Confederacies amongst the less powerful Nations for the purpose of maintaining the Balance against a Nation whose Power causes them alarm.[24]

The Balance of Power.

§ 104. The Right of Confederacy under the Natural Law of Nations is at the foundation of the Right of Intervention in the interest of what has been termed, since the Peace of Utrecht, (anno 1713,) the Balance of Power. The System of Balance, or European Equilibrium, is a creation of Positive Law. The outlines of the System may be discovered in the Provisions of the Treaty of Westphalia, (anno 1648,) and of the Treaties of Copenhagen (anno 1648) and of Oliva, (anno 1660,) but the express recognition of the System of Balance, as a rule of Positive Law, dates from the Treaties of Utrecht, (anno 1713,) concluded expressly according to the recital in the Treaty between Great Britain and Spain, "Ad formandam stabiliendamque pacem ac tranquillitatem Christiani orbis Justo Potentiæ Æquilibrio."[25] The maintenance of the Balance of Power in Europe is expressly set forth in the Acts of Renunciation to the Crown of Spain executed by the French Princes of the House of Bourbon, which are inserted in the body of the Treaties of Utrecht, as the motive cause of their Renunciation. The European System of Positive Law may be said to have rested upon the Treaties of Utrecht down to the French Revolution, (anno 1789,) although

[24] Wolff, Jus Gentium, § 652. Klüber, § 42.

[25] Schmauss. Corp. Jur. Gent. Academicum, p. 1419.

during that period various elements were introduced into that System, which were calculated to derange the Balance of Power established at Utrecht. The wars of the French Revolution crumbled that System into atoms, and one main object of the Congress of Vienna, next only to that of settling a General Peace, was to secure the maintenance of the repose of Europe by a readjustment of the Balance of Power. The intentions of the Allied Powers in this sense had been avowed by them in the Preamble of the Convention of Paris (23 April, 1814).[26] That the Balance of Power is a principle at the foundation of the Positive Law of Europe, and that the Powers which were Parties to the Treaties of Vienna acted upon that principle in framing the Great European Settlement of 1815, has been recorded by the Five Powers in several important International Acts. Thus the Five Great Powers, which were Parties to the Treaty of Paris, having been invited by the King of Holland to assist him in the settlement of the disturbed relations between the Belgian Provinces and the Dutch Crown, placed formally on record their view of the grounds which justified their Intervention. Having expressly stated,[27] that the original object of uniting the Belgian Provinces with Holland was to establish a *Just Equilibrium* in Europe, they proceed to say that the Five Powers had a right, and that events imposed upon them a duty, to prevent the Belgian Provinces, as an Independent State, causing any disturbance of the general security and the European Equilibrium. The same principle was affirmed in the Treaty of London, (8 May, 1852)[28], concluded between the Five

[26] Martens, N. R. I. p. 706.

[27] Nineteenth Protocol of the Conferences of the Five Powers, (19 Feb. 1831.) Martens, N. R. X. p. 197. British and Foreign State Papers, XVIII. p. 779.

[28] Annuaire Historique Universel, 1851. Appendix, p. 191.

Powers and Sweden on the one hand, and the King of Denmark on the other hand, in recognition of the establishment of an order of Succession in the Danish Provinces of the Monarchy, which should harmonize with that already existing in the German Duchies. It was on that occasion formally declared, "that the maintenance of the integrity of the Danish Monarchy was intimately connected with the general interests of the European Equilibrium." The same principle was relied upon by the Governments of Great Britain and France, when they protested in 1851 against the proposed incorporation of any non-German States into the Germanic Confederation[29], as a derangement of the European Equilibrium. The last great occasion for the recognition of the principle of the Balance of Power, as lying at the foundation of that branch of the Positive Law of European Nations which may be termed the Public Conventional Law of Europe, was furnished by the latest settlement of the Eastern Question. The Preamble of the Treaty of Constantinople, concluded between Great Britain and France on the one hand, and the Ottoman Porte on the other, (March 12, 1854,)[30] recites, "that her Majesty the Queen of Great Britain and Ireland, and his Majesty the Emperor of the French, have been requested by his Highness the Sultan to assist him in repelling the attack which has been made by his Majesty the Emperor of all the Russias on the Territory of the Sublime Porte, an attack whereby *the Integrity of the Ottoman Porte and the Independence of the Sultan's throne are endangered*, and as their Majesties are perfectly convinced that the existence of

[29] Annuaire French Memorandum. App. p. 176. English note. App. p. 181.

[30] Martens, N. R. Gén. XV. p. 565.

the Ottoman Empire in its present extent is of *essential importance to the Balance of Power amongst the States of Europe;* and as they have in consequence agreed to afford his Highness the Sultan the assistance which he has requested to this end, their aforesaid Majesties and his Highness the Sultan have deemed it proper to conclude a Treaty, so as to attest their intentions in conformity with the above."

In the Conferences subsequently held at Vienna in 1855 between France, Great Britain, Austria, the Ottoman Porte, and Russia, the principle of maintaining the European Equilibrium was repeatedly invoked by all Parties, as supplying a rule for approving or rejecting the various proposals of accommodation. This principle was more especially relied upon in reference to the Neutralisation of the Black Sea, and to the maintenance of the ancient Rule of the Ottoman Porte, according to which the Passage of the Straits leading from the Mediterranean into the Black Sea are closed against the vessels of war of all Nations, whilst the Ottoman Porte remains at peace with all Nations.[31]

[31] Protocol to the 12th Conference, (21 April, 1155.) Martens, N. R. Gén. XV. p. 676.

CHAPTER VII.

RIGHT OF ACQUISITION.

Establishment of a Nation in a Country—Juridical Notion of Possession—Possession as founding a Right of Property—Primitive and Derivative Acquisition—Settlement of a Nation—Right of Occupation—Right of Discovery—Notification of Discovery—Acts Confirmatory of Occupation—Discovery followed by Settlement constitutes a Perfect Title—Extent of Right of Discovery—Extent of Right of Occupation—Principles of Law advanced by the United States of America—Discovery of the Mouth of a River—Conflict with Acknowledged Law—Right of Settlement—Usucaption or Prescription—Territory of the Hudson's Bay Company—Right of contiguity—Arcifinious States—Discovery of the New World—Settlements in the New World—Possessory Right of Native Indians—Agriculture in relation to Pasture—The Indian Title—Derivative Acquisition—Title by Cession.

Establishment of a Nation in a Country.

§ 105. By virtue of its Independence and its Right of Self-Preservation, every Nation is entitled to perfect freedom of action, with a view to promote its own welfare within a sphere, which is consistent with the Independence and Self-Preservation of other Nations. It may accordingly not merely make use of the gifts of nature for the satisfaction of its immediate wants, but, if they are susceptible of exclusive possession, it may appropriate them to meet its future wants. This Right of a Nation to possess a thing (*Jus Possidendi*) applies not merely to the fruits of the earth, but to the soil which produces it. Vattel regards the right of a Nation to possess a territory as incident to its Right of Self-Preservation. "The earth," he writes,[1] "belongs to mankind in general, destined by the Creator to be their common habitation, and to supply them with food; they all possess a Natural

[1] Droit des Gens, L. I. § 203.

Right to inhabit it, and to derive from it whatever is necessary for their sustenance and suitable to their wants. But when the human race became extremely multiplied, the earth was no longer capable of furnishing spontaneously and without culture sufficient support for its inhabitants; neither could it have received proper cultivation from wandering tribes of men continuing to possess it in common. It therefore became necessary that those tribes should fix themselves somewhere, and appropriate to themselves portions of land, in order that they might, without being disturbed in their labour, or being disappointed in the fruits of their industry, apply themselves to render those lands fertile, and thence derive their sustenance. Such must have been the origin of the Rights of Property and Domain, and it was a sufficient ground to justify their establishment. Since their introduction, the Right, which was common to all mankind, is individually restricted to what each lawfully possesses. The country which a Nation inhabits, whether that Nation has emigrated thither in a body, or the different families of which it consists were previously scattered over the country, and there uniting formed themselves into a political society, that country, I say, is the Settlement of the Nation, and it has a peculiar and exclusive right to it."

Juridical Notion of Possession.

§ 106. The Right of a Nation to possess a territory being admitted, it follows that we should consider what constitutes Lawful Possession; in other words, what constitutes Possession, not merely as the consequence of a Right, but as itself the Foundation of Rights. "All Definitions of Possession," writes Savigny,[2] "however much they may differ from one

[2] Das Recht des Besitzes. Giessen, 1837, p. 2, 3. This work has been translated into English by Sir Erskine Perry. London, 1848.

another in terms, and even in substance, contain the same general principle as their basis, from which every inquiry into the subject must proceed. By the possession of a thing, we always conceive the condition, in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it may be prevented. Thus the seaman possesses his ship, but not the water in which it moves, although he makes each of them subserve his purpose. The condition of a thing, which is termed *Detention*, and upon which all our notions of Possession are founded, is not by itself in any way an object of Legislation, and the Notion of it is not in itself a Juridical Notion, but it bears an immediate relation to a Juridical Notion, whereby it becomes itself an object of Legislation. For as Property consists in the legal power of dealing with a thing at will, and of excluding every one else from its enjoyment, the exercise of Property takes place by Detention, and Detention is accordingly the condition of Fact, which corresponds to Property as the condition of Law." The Right to possess (*Jus Possidendi*) thus forms part of the Theory of Property, and the act of Detention acquires a Juridical character in connection with the Right to possess.

Possession as founding a right of property.

§ 107. The lawfulness of all possession depends upon what the later Roman Jurists call the *modus acquirendi*. The Act of Detention *per se* in the case of a person detaining a thing constitutes a condition of Fact, which has been termed by Jurists *Natural Possession*. The condition of Fact involved in bare Detention (nuda rei prehensio) is regarded as terminable at any moment; but if a person detains a thing *animo sibi habendi*, and manifests his intention of exercising ownership for himself, such con-

tinuing Detention gives rise to a condition of Law, and it has consequently been termed *Legal Possession.* "Apiscimur possessionem animo et facto, neque per se animo aut per se corpore[3]." The condition of Law arises in this manner. There is an obligation of Natural Law upon all persons to refrain from Personal violence, for Personal inviolability is a Natural Right. But the continuing Detention of a thing, *animo sibi habendi,* cannot be interrupted or put an end to against the will of the party so detaining it, without violence to his person. There thus arises an obligation of Natural Law to refrain from disturbing a party who is in possession of a thing, as the Inviolability of the Person extends to those acts of disturbance, whereby the Person might at the same time be, however indirectly, interfered with. The Right of Property is thus a Corollary to the Right of Personal Inviolability, for *the Right of Property* in a thing, or the lawful power of dealing with it at will, may be said to have arisen, when all persons recognise the party in Possession of a thing to have a Right of excluding them from dealing with it, and that Right is *de facto* recognised, when all persons admit an obligation on themselves to refrain from disturbing him in his possession of it. Possession accordingly, that is, a continuing Detention *animo sibi habendi* as distinguished from bare Detention, gives rise to the right of not being disturbed; and when the Possession itself is rightful in its origin, the Right which ensues is a *perfect Right.* In respect of this Right, certain rules[4], as to the acquisition and

3 Dig. L. XLI. Tit. II. § 3.

4 These rules, and many others which refer to Dominion and its incidents, are borrowed from the Roman Jurisconsults, who held them to be institutions of the Jus Gentium, or common Law of all Nations.

loss of Possession, have been established. The first rule is, that a person may take possession of a thing which has no owner, so as to acquire Rightful Possession of it; and Property is in such case acquired simultaneously with Possession. "Quod enim nullius est, id ratione naturali occupanti conceditur[5]." The second rule is, that a person may acquire Rightful Possession of a thing of which the previous owner has renounced Possession, either relatively in his favour by Cession, or absolutely to the first comer by Abandonment.

Primitive and Derivative acquisition.

§ 108. Rightful Acquisition, as the foundation of the Right of Property in individuals, is accordingly either *primitive* or *derivative*[6]. Primitive Acquisition is termed *Occupation*. "On appelle *occupation* un fait, par lequel quelqu'un déclare qu'une chose, qui n'est à personne, doit être à lui, et la réduit en tel état qu'elle peut être sa chose. Il paroît de là que le droit d'occuper une chose, ou de s'en emparer, appartient naturellement à chacun indifféremment, ou bièn que c'est un droit commun de tous les hommes, et comme on appelle manière primitive d'acquérir celle par laquelle on acquiert le domaine d'une chose qui n'est à personne, il s'ensuit que l'occupation est la manière primitive d'acquérir[7]."

Such being the Law of Nature in regard to primitive acquisition on the part of individuals, the Law of Nations is in perfect accord with it. "All mankind," writes Vattel, "have an equal right to things that have not yet fallen into the hands of any one; and those things belong to the person who first takes possession of them. When, therefore, a Nation finds a country uninhabited and without an owner, it may

5 Dig. L. XLI. Tit. I. § 3.
6 Grotius, L. II. c. 3. § 1.
7 Wolff, Institutions du Droit de la Nature et des Gens, § 210.

lawfully take possession of it; and after it has sufficiently made known its will in this respect, it cannot be deprived of it by another Nation. Thus navigators going on voyages of discovery, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their Nation, and this title has been usually respected, provided it was soon after followed by a real possession[8]."

Settlement of a Nation.

§ 109. Settlement accordingly in a country in the case of a Nation corresponds to the continuing Detention of a thing in the case of an individual, and the Natural Right of a Nation founded on Settlement corresponds to the Natural Right of an individual founded on Possession. There is thus an obligation of Natural Law upon all Nations to refrain from disturbing a Nation which has settled in a country, which was vacant at the time of its settlement. "Un état peut acquérir des choses qui n'appartiennent à personne (res nullius) par l'*occupation* (originaire), les biens d'autrui au moyen de *conventions* (occupation dérivative)...Pour que l'*occupation* soit légitime, la chose doit être susceptible d'une propriété exclusive, elle ne doit appartenir à personne; l'état doit avoir l'intention d'en acquérir la propriété et en prendre possession, c'est à dire, la mettre entièrement à sa disposition et dans son pouvoir physique. Ceci a lieu lorsqu'il a tellement influé sur la chose, qu'elle ne peut lui être enlevée sans lui ravir en même temps le fruit du changement légitime qu'il y a opéré[9].

Right of occupation.

§ 110. The exclusive Right of a Nation to Territory which it has acquired by *Occupation*, has been universally recognised by the Nations of Europe, and in respect of such Right certain rules have become

8 Droit des Gens, L. I. § 207.

9 Klüber, Droit des Gens, Part II. c. 1. § 125.

established by usage, whereby the condition of Law constituting *Occupation* may be placed beyond doubt. The Natural Right of an individual to appropriate the object of his discovery rests upon the presumption that it has no owner, which presumption, in the case of the first comer, is a necessary presumption, and consequently a *praesumptio juris et de jure*. But the act of discovery alone does not constitute Occupation by the Law of Nations. The title which results from Discovery is only an inchoate title. It is not recognised in the Roman Law, nor has it a place in the system of Grotius or of Puffendorf. The principle, however, upon which it is based, is noticed by De Wolff.

"Pareillement si quelqu'un renferme un fond de terre dans des limites, ou le destine à quelque usage par un acte non passager, ou que se tenant sur ce fond limité, il dise en présence d'autres hommes qu'il veut que ce fond soit à lui, il s'en empare[10]." M. Luzac has appended to this passage the following note, "Nous ne trouvons pas cette occupation dans le droit Romain. C'est sur elle que sont fondés les droits, que les puissances s'attribuent, en vertu des découvertes."

Right of Discovery.

§ 111. A Nation is under an obligation towards other Nations analogous to that under which an individual stands towards other individuals with regard to the discovery of a thing, if it seeks to found an exclusive title to its possession upon *the Right of Discovery*. It must manifest in some way or other to other Nations its intention to appropriate the territory to its own purposes. The Comity of Nations then sanctions a presumption, that the execution of the intention will follow within a reasonable time the

[10] Wolff, Institutions du Droit de la Nature et des Gens, § 213.

announcement of it. But Natural Reason requires that the Discovery should be notified to other Nations, otherwise if actual Possession has not ensued, the obvious inference would be that the Discovery was a transient act, and that the territory was never taken possession of *animo et facto*. A Discovery accordingly, which has been concealed from other Nations, has never been recognised as a good title to bar them from settling in a territory: it is an inoperative act. Lord Stowell[11] has accordingly noticed, as an indisputable fact, that in newly discovered countries, where a title is meant to be established for the first time, some act of Possession is usually done and proclaimed as a *Notification of the fact*.

Notification of Discovery.

§ 112. The mode of Notification, in other words, what acts should be respected by the Comity of Nations, and be held sufficient to make known the intention of a Nation to avail itself of a discovery, has been a subject of much dispute. The disposition however of Writers, as well as of Statesmen, has been to limit rather than to extend the Comity of Nations in this respect. Thus Vattel writes, "The Law of Nations will therefore not acknowledge the Property and Sovereignty of a Nation over any uninhabited countries except those of which it has really taken possession, in which it has formed settlements, or of which it has actual use. In effect, when Navigators have met with desert countries in which those of other Nations had in their transient visits erected some monuments to shew their having taken some possession of them, they have paid as little regard to that empty ceremony, as to the regulation of the Popes, who divided a great part of the world between the Crowns of Castile and Portugal[12]."

[11] The Fama, 5 Robinson, p. 115. [12] Droit des Gens, L. I. § 208.

To the same purport, Martens writes, "Supposé que l'occupation soit possible, il faut encore qu'elle ait eu lieu effectivement; que le fait de la prise de possession ait concouru avec la volonté manifeste de s'en approprier l'objet. La simple déclaration de volonté d'une Nation ne suffit pas, non plus qu'une Donation Papale, ou qu'une Convention entre deux Nations pour imposer à d'autres le devoir de s'abstenir de l'usage ou de l'occupation de l'objet en question. Le simple fait d'avoir été le premier à découvrir ou à visiter une île, &c., abandonnée ensuite, semble insuffissant, même de l'aveu des Nations, tant qu'on n'a point laissé de traces permanentes de possession et de volonté; et ce n'est pas sans raison qu'on a souvent disputé entre les Nations, si des croix, des poteaux, des inscriptions, &c., suffisent pour acquérir ou pour conserver la propriété exclusive d'un pays qu'on ne cultive pas[13]."

Klüber to the same effect, writes thus, "Pour acquérir une chose par le moyen de *l'occupation*, il ne suffit point d'en avoir seulement l'intention, ou de s'attribuer une possession purement mentale; la déclaration même de vouloir occuper, faite antérieurement à l'occupation effectuée par un autre, ne suffirait pas. Il faut qu'on ait réellement occupé le premier, et c'est par cela seul, qu'en acquérant un droit exclusif sur la chose, on impose à tout tiers l'obligation de s'en abstenir. L'occupation d'une partie inhabitée et sans maître du Globe de la Terre, ne peut donc s'étendre plus loin qu'on ne peut tenir pour constant qu'il y ait eu effectivement prise de possession, dans l'intention de s'attribuer la propriété. Comme preuves d'une pareille prise de possession, ainsi que de la continuation de la possession en propriété, peuvent servir

[13] Précis du Droit des Gens, § 37.

tous les signes extérieurs qui marquent l'occupation et la possession continue[14]". To this passage there is appended the following note. "Le droit de propriété d'état peut, après le droit des Gens, continuer à exister, sans que l'état continue la possession corporelle. Il suffit qu'il existe un signe qui dit que la chose n'est ni *res nullius*, ni délaissée. En pareil cas, personne ne saurait s'approprier la chose, sans ravir de fait à celui, qui l'a possédée jusqu' alors en proprieté, ce qu'il y a opéré de son influence d'une manière légitime : enlever ceci, ce serait blesser le droit du propriétaire."

Acts confirmatory of Occupation.

§ 113. It is difficult to lay down absolutely what constitutes a sufficient sign, that a territory has been effectively reduced into Possession after Discovery. Bynkershock, who was originally opposed to the continuance of any exclusive Right founded on Occupation, unless natural Possession was maintained, subsequently qualified his view in deference to the objections of Christian Thomasius: "Res immobiles," writes Thomasius[15], "quæ sunt nullius, occupatæ esse censentur, si cæptæ sunt custodiri, aut si cæperim solo uti ad id, ad quod destinatum est naturâ, et usus durat; V. G. Si ædificaverim in solo, si solum vallo et fossa vel sæpibus circumdederim, conservatur possessio, quamdiu continuatur custodia, etiamsi non incumbam possessioni, sed abeam. V. G. Si ager consitus sit, et fructus a me satos ferat, si ager circumseptus sit, si ædes extructæ maneant, si clavem ad ædes habeam, si alios arceam ab usu rei." "Hæc ille," writes Bynkershoek, "et recte, nam omnibus his, quos recenset, modis possessio ex apprehensione cœpta, porro continuatur, et continuata possessione continuatur dominium. Cultura

[14] Droit des Gens, § 126.

[15] Annotationes ad Ulricum Huberum de Jure Civitatis, L. II. s. 11. § 43.

itaque et cura agri possessionem quam maxime indicat. Neque enim desidero vel desideravi unquam, ut tunc demum videatur quis possidere, si res mobiles ad instar testudinum dorso ferat suo, vel rebus immobilibus incubet corpore, ut gallinæ solent incubare ovis. *Præter animum possessionem desidero*, sed *qualemcungue, quæ probet me nec corpore desiisse possidere*[16].

Discovery followed by Settlement constitutes a perfect title.

§ 114. When *Discovery* has been followed by the *Settlement* of a Nation, other Nations in accordance with the Law of Nature recognise a perfect title in the occupant. Where discovery has not been immediately followed by settlement, but the fact of discovery has been notified, other Nations by courtesy pay respect to the notification, and the Usage of Nations has been to presume that Settlement will take place within a reasonable time; but unless discovery has been followed within a reasonable time by some sort of settlement, the presumption arising out of notification is rebutted by *non user*, and lapse of time gives rise to the opposite presumption of Abandonment. Thus in the Conference[17] held at London between the Commissioners of Great Britain and of the United States of North America in 1826, the British Commissioners, Messrs. Huskisson and Addington, maintained these views: "Upon the question how far prior discovery constitutes a legal claim of Sovereignty, the Law of Nations is somewhat vague and undefined. It is however admitted by the most approved writers, that mere accidental discovery, unattended by exploration, by formally taking possession in the name of the discoverer's Sovereign, by occupation and settlement more or less permanent,

[16] De Dom. Maris, c. 1. [17] British Statements annexed to the Protocol of the Sixth Conference.

by purchase of the territory on receiving the Sovereignty from the Nation, constitutes the lowest degree of title; and that it is only in proportion as first discovery is followed by any or all of these acts, that such title is strengthened and confirmed." Mr. Gallatin, on the other hand, the Plenipotentiary of the United States[18], thus states the American view, "It may be admitted, as an abstract principle, that, in the origin of Society, first occupancy and cultivation were the foundation of the rights of private property and of National Sovereignty. But that principle, on which principally, if not exclusively, it would seem that the British Government wishes to rely, could be permitted, in either case, to operate alone and without restriction, so long only as the extent of vacant territory was such, in proportion to the population, that there was ample room for every individual and for every distinct community or Nation, without danger of collision with others. As in every Society, it had soon become necessary to make laws, regulating the manner in which its members should be permitted to occupy and to acquire vacant land within its acknowledged boundaries; so also Nations found it indispensable for the preservation of peace, and for the exercise of distinct jurisdiction, to adopt particularly, after the discovery of America, some general rules, which should determine the important previous question, 'Who had a right to occupy.'

"The two rules generally, perhaps universally, recognised and consecrated by the Usage of Nations, have followed from the nature of the subject.

"By virtue of the first, prior discovery gave a right

[18] American Counterstatement annexed to the Protocol of the Seventh Conference.

to occupy, provided that occupancy took place within a reasonable time, and was ultimately followed by permanent settlement and by the cultivation of the soil."

"In conformity with the second, the right derived from prior discovery and settlement, was not confined to the spot discovered or first settled. The extent of territory which would attach to such first discovery or settlement, might not in every case be precisely determined. But that the first discovery and subsequent settlement within a reasonable time of *the mouth of a river*, particularly if none of its branches had been explored prior to such discovery, gave the right of occupancy and ultimately of Sovereignty to the whole country drained by such river and its several branches, has been generally admitted. And in a question between the United States and Great Britain, her acts have with propriety been appealed to, as shewing that the principles on which they rely accord with their own[19]."

Extent of Right of Discovery.

§ 115. The question as to the extent of territory over which the discovery of a part gives rise to the right of occupancy, may receive a solution by reference to the principles of Law, which decide to what extent natural possession must go in order to give a title to more than is actually inhabited. It is not necessary in order to constitute the occupant of a thing the legal proprietor of it, that he should have natural possession of the whole of it; if he has possession of a part which cannot be separated from the whole, he is in possession of the whole. The Roman Jurists applied this principle to the possession of land, "Quod autem diximus *et corpore et animo acquirere nos debere possessionem*, non utique ita

[19] Message of President Adams to Congress, Dec. 28, 1827.

accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet, sed sufficit quamlibet partem ejus fundi introire, dum mente et cogitatione hac sit, uti totum fundum usque ad terminum velit possidere[20]." In the case of a Legal Entity, as for instance the *property* of a farm or garden, the Law enables us to ascertain its boundaries by reference to records, and there is no practical difficulty in determining the extent of land over which the *possession* of a part carries with it the Right of Possession, (Jus Possessionis.) But in the case of an unoccupied country, the *natural possession* of a part cannot carry with it the *legal possession* of the whole; as if it were so, there would be no territory legally vacant on the mainland, seeing that the first settlers in any part of a great Continent would by virtue of occupying that part be in rightful possession of the whole.

Extent of Right of Occupation.

§ 116. "If at the same time," writes Vattel[21], "two or more Nations discover and take possession of an island or any other desert land without an owner, they ought to agree between themselves and make an equitable partition; but if they cannot agree, each will have the Right of Empire and the Domain in the parts in which they have first settled." So far Vattel seems to restrict the Right of Possession to the country actually taken possession of; but in another passage he indirectly points to something more. "It may happen[22], that a Nation is contented with possessing only certain places, or appropriating to itself certain rights in a country which has not an owner, without being solicitous to take possession of the whole country. In this case, another Nation may take possession of what the first has neglected: but

[20] Dig. XLI. Tit. II. § 3. [21] Droit des Gens, L. II. § 9.
[22] Ibid. § 98.

this cannot be done without allowing all the rights acquired by the first to subsist in their full and absolute Independence." Hence if a Nation has occupied a territory, it has a right to every thing, as appurtenant to the territory, which is necessary for the integrity and security of its possession. Upon an analogous principle, when a Nation has discovered a country, and notified its discovery, it is presumed to intend to take possession of the whole country within those natural boundaries which are essential to the Independence and Security of its Settlement, and its Right of Discovery is coextensive with such limits.

Principles of Law advanced by the United States of America.

§ 117. The principles applicable to such questions were discussed by the Commissioners of the United States of America, in the negociations with the Commissioners of Spain, on the subject of the Western boundary of Louisiana. "The principles," they observe, "which are applicable to the case, are such as are dictated by reason, and have been adopted in practice by European Nations in the discoveries and acquisitions which they have respectively made in the New World. They are few, simple, intelligible, and at the same time founded in strict justice. The first of these is that, when any European Nation *takes possession of any extent of sea-coast, that possession is understood as extending into the interior Country, to the sources of the rivers emptying within that coast, to all their branches, and the country they cover*, and to give it a right in exclusion of all other Nations to the same[23]. It is evident that some rule or principle must govern the rights of European Powers in regard to each other, in all such cases, and it is certain that none can be adopted, in those

[23] Mémoire de l'Amérique, p. 116.

cases to which it applies, more reasonable or more just than the present one. Many weighty considerations shew the propriety of it. Nature seems to have destined a larger range of territory so described for the same Society; to have connected its several parts together by a common interest, and to have detached them from others. If this principle is departed from, it must be by attaching to such discovery and possession a more enlarged or contracted scope of acquisition: but a slight attention to the subject will demonstrate the absurdity of either. The latter would be to restrict the rights of an European Power, who discovered and took possession of a new country, to the spot on which its troops or settlements rested: a doctrine which has been totally disclaimed by all the Powers who made discoveries and acquired possession in America. The other extreme would be equally improper; that is, that the Nation, who made such discovery should, in all cases, be entitled to the whole territory so discovered. In the case of an Island, whose extent was seen, which might be soon sailed round and preserved by a few forts, it may apply with justice; but in that of a Continent it would be absolutely absurd. Accordingly we find that this opposite extreme has been equally disclaimed and disavowed by the doctrine and practice of European Nations. The Great Continent of America, North and South, was never claimed or held by any one European Nation, nor was either great section of it. Their pretensions have always been bounded by more moderate and rational principles. The one laid down has obtained general assent[24]."

Possession of the

The Commissioners of the United States on this

[24] British and Foreign State Papers, 1817–18, p. 327.

coast includes the inland territory.

occasion, in applying the above principle to the claim of their Nation, were careful not to press the doctrine of virtual possession beyond those limits within which the Nations of Europe would be in accord with them. On the authority of the principle above stated, they say, "it is evident that by the discovery and possession of the River Mississippi in its whole length, and *the Coast adjoining it*, the United States are entitled to the whole country dependent on that River, the waters which empty into it, and their several branches, *within the limits on that coast.*" In other words, they maintain that, the occupation of the sea-coast entitles a Nation to the possession of the inland territory, and of the navigable rivers included within it; in which position of Law all European Nations agree. But such a position of Law differs materially from that, which was contended for by Mr. Gallatin on behalf of the United States in the Conferences in London in 1827, already alluded to, (§ 114.)

Discovery of the mouth of a River.

§ 118. The position of Law maintained on behalf of the United States by Mr. Gallatin in 1827, above alluded to, (§ 114,) had been previously advanced by Mr. Rush in 1824, when resident as Minister Plenipotentiary of the United States in London, "I asserted," he writes to the American Secretary of State, Hon. J. Quincy Adams, "that a Nation discovering a country *by entering the mouth of its principal river* at the sea-coast, must necessarily be allowed to claim and hold as great an extent of the Interior country as was described by the course of such principal river and its tributary streams[25]."

The Plenipotentiaries of the United States in support of their position, appealed to the language of

[25] British and Foreign State Papers, 1825–26, p. 506.

ancient Charters accorded to Companies of Adventurers and to individual explorers by various European Sovereigns, as evidence of the practice of European Nations in regard to the rights resulting from discovery. It was replied on behalf of the British Plenipotentiaries, that those Charters had no valid force or effect against the subjects of other Sovereigns, but could only bind and restrain *vigore suo* those who were under the Jurisdiction of the Grantor of the Charters, and that although they might confer on the Grantees an exclusive title against the subjects of the same Sovereign Power, they could only affect the subjects of other Sovereign Powers, so far as the latter might be bound by the Common Law of Nations to respect acts of Discovery and Occupation, effected by the members of other Independent Political Communities. The reply of the British Commissioners was in perfect harmony with the principle under which Great Britain, France, and Holland, refused to recognise the authority of the Papal Donation; by virtue whereof Spain and Portugal claimed to exclude all other European Nations from the possession and use of the lands and seas which had been granted to them in the famous Bull of Pope Alexander VI (anno 1493.) Accordingly when Mendoza the Spanish Ambassador remonstrated against the expedition of Drake, Queen Elizabeth replied, that "she did not understand why either her subjects or those of any other European Power should be debarred from traffick in the Indies: that she did not acknowledge the Spaniards to have any title by donation of the Bishop of Rome, so she knew no right they had to any places other than those they were in actual possession of; for their having touched only here and there upon a Coast, and given names

to a few rivers and capes, were such insignificant things as could in no way entitle them to property (proprietas) further than in the parts where they actually settled and continued to inhabit[26]."

Conflict with acknowledged Law.

§ 119. The principle involved in the position of Law, advanced by the United States on the above occasions, seems not to be reconcilable with other positions of Law, in which all Nations agree. It is inconsistent, in the first place, with one of the positions of Law upon which the United States themselves rested their claims against Spain respecting the boundary of Louisiana in 1805, (s. 117,) namely, that the discovery and occupation of *an extent of seacoast* by a Nation is understood to convey to that Nation a right of possession over the interior country *as far as the watershed-line*, which position of Law Messrs. Monroe and Pinckney, the Commissioners of the United States, then alleged to have been completely established by the Controversy between France and Spain on the one hand, and Great Britain on the other, which produced the War of 1755 between those Nations.

It is obvious that a claim to all the lands watered by a river and its tributaries, founded on the discovery and occupation of the mouth of the river, must conflict with a claim to all the inland territory as far as the line of watershed, founded in the discovery and occupation of an extent of seacoast, about which latter position of Law there is no dispute amongst Nations. Such a claim is, in the second place, inconsistent with the position of Law, that the occupation *de facto* of one bank of a river and the river itself by one Nation, does not establish a Right of Possession over the opposite bank, so as to exclude another Na-

[26] Camdeni Annales, anno 1580.

tion from settling upon it, if it should be vacant *de facto*. The doctrine of the United States Commissioners against which Great Britain considered it equally due to herself and to other Powers to enter her protest, may therefore be regarded as extravagant, since it derives no countenance from the Law of Nature, which regards rivers as appurtenant to land, and not land as adherent to rivers, and it cannot be admitted without derogating from established rules of Public Law acknowledged by all Nations.

Right of Settlement.

§ 120. *Settlement*, when it has supervened on *Discovery*, constitutes a perfect title, but a title by settlement when not combined with a title by discovery is in itself imperfect, and its *immediate* validity will depend upon one or other condition, that the right of discovery has been waived *de jure* by non-user, or that the right of occupancy has been renounced *de facto* by the abandonment of the territory. *Acquisition by settlement* is distinguished from *acquisition by discovery* and *acquisition by occupancy* in this respect, that no second discovery, no second occupancy can take place, whereas a series of settlements may have been successively made, and each of them in its turn abandoned, and the last settlement may, under given circumstances, constitute an exclusive title. Again, the presumption of Law will always be in favour of a title by settlement. "Commodum possidentis in eo est, quod etiamsi ejus res non sit, qui possidet, si modo actor non potuerit suam esse probare, remanet suo loco possessio; propter quam causam, cum obscura sint utriusque jura, contra petitorem judicari solet."[27]

Where *title by settlement* is superadded to *title by discovery*, the Law of Nations will acknowledge the settlers to have a perfect title; but where title by

[27] Justin. Institut. L. IV. Tit. 15. § 4.

settlement is opposed to title by discovery, although no Convention can be appealed to in proof of the discovery having been waived, still, a tacit acquiesence on the part of the Nation, that asserts the discovery, during a reasonable lapse of time since the settlement has taken place, will bar its claim to disturb the settlement. Thus Mr. Wheaton writes :—The constant and approved practice of Nations shews, that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other, in the same manner as by the Law of Nations, and by the Municipal Code of every Civilised Nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. This rule is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him ; and upon the inference, fairly to be drawn from his silence and neglect, of the original defect of his title, or of his intention to relinquish it."[28]

Title by settlement, though originally imperfect, may be thus perfected by enjoyment during a reasonble lapse of time, the presumption of Law from undisturbed possession being, that there is no prior owner, because there is no claimant, and no better proprietary right, because there is no asserted right. The silence of other parties raises a presumption of their acquiescence, and their acquiescence raises a presumption of a defect of title on their part, or of an abandonment of their title. A title once abandoned whether tacitly or expressly, cannot be resumed. " Celui qui abandonne une chose cesse d'en être le

[28] Elements of International Law, part II. c. iv. § 5.

maître, et par conséquent une chose abandonnée devient une chose qui n'est à personne."[29]

§ 121. Title by settlement, then, as distinguished from title by discovery, when set up as a perfect title, resolves itself into title by *usucaption* or *prescription.*[29] Wolff defines *usucaption* to be an acquisition of domain founded on a presumed desertion. Vattel[30] says it is the acquisition of domain founded on a long possession, uninterrupted and undisturbed, that is to say, an acquisition solely proved by this possession. *Prescription*, on the other hand, according to the same author, is the exclusion of all pretensions to a right, an exclusion founded on the length of time during which that right has been neglected, or, according to De Wolff's definition, it is the loss of an inherent right by virtue of a presumed consent. Vattel writing in French, and observing that the word *usucaption* was but little used in that language, made use of the word *prescription*, wherever there were no particular reasons for employing the other expression. The same remark may be applied in reference to our own language, and thus this title is generally spoken of as *title by prescription.* What lapse of time is requisite to found a valid title by prescription has not been definitely settled. The Law of Nature suggests no rule. Where, however, the claimant cannot allege undoubted ignorance on his part or on the part of those from whom he derives his right, or cannot justify his silence by lawful and substantial reasons, or has neglected his right for such a number of years as to allow the respective rights of the two parties to become doubtful, the presumption of abandonment

Usucaption or Prescription.

[29] Wolff, Institutions du Droit de la Nature et des Gens, § 23.
[30] Droit des Gens, L. II. c. 11. § 140.

will be established against him, and he will be excluded by ordinary prescription. Lapse of time, in the case equally of Nations as of individuals, robs the parties of the means of proof; so that if a *bonâ fide* possession were allowed to be questioned by those who have acquiesced for a long time in the enjoyment of a thing by the possessor of it, length of possession, instead of strengthening, would impair the title of the possessor: the inconvenience of such a result is so obvious, that the practice of Nations and individuals has equally repudiated it.

Territory of the Hudson's Bay Company.

§ 122. Thus in regard to the territory of the Hudson's Bay Company, it was alleged in the negociations preliminary to the treaty of Utrecht, that the French had acquiesced in the settlement of the Bay of Hudson by the Company incorporated by Charles II. in 1663, since M. Fontenac, the Governor of Canada, in his correspondence with Mr. Baily, who was Governor of the Factories in 1637, never complained, "for several years, of any pretended injury done to the French by the said Company's settling a trade, and building of forts at the bottom of the Bay[31]." The King of England, it is true, in his Charter had set forth the Title of the British Crown, as founded on discovery; the title by discovery, however, required to be perfected by settlement; and thus, in the negociations, the subsidiary title by settlement was likewise set up by the British Commissioners, and the acquiescence of the French was alleged, either as a bar to their setting up any conflicting title by discovery, or as establishing the presumption of their having abandoned their asserted rights of discovery[32].

[31] General Collection of Treaties, &c., London, 1710–33, vol. I. p. 446.

[32] Twiss on The Oregon Question, p. 171.

§ 123. What extent of territory is *de jure* appendant to the settlement of a Nation in a given place by reason of *Contiguity*, must depend upon the circumstances of each case. It may sometimes be determined without difficulty by the geographical features of the Country, but in many cases it will be governed by considerations founded on the necessary uses of the settlers. The principle of *Vicinitas*, as applied in the Jurisprudence of Imperial Rome, has been admitted by the usage of Nations to control this question in the absence of special circumstances. Thus in the case of alluvial deposits, the Roman Jurists held that the possessor of the adjoining bank of a river had a proprietary title to them, and if an island were formed in the channel of the river, the possessor of the neighbouring bank had a right of property in it; on the other hand, if an island were formed in the mid-channel, it would be the common property of the owners of the two banks. Thus, "Quod per alluvionem agro nostro flumen adjecit, jure gentium nobis acquiritur[32];" again, "Insula nata in flumine, quod frequenter accidit, si quidem mediam partem fluminis tenet, communis est eorum, qui ab utraque parte fluminis prope ripam prædia possident, pro modo latitudinis cujusque fundi, quæ latitudo prope ripam sit; quod si alteri parti proximior est, eorum est tantum, qui ab ea parte prope ripam prædia possident[33]." A different practice in the case of Nations, whereby such newly formed lands should be open to the occupancy of the first comer, would manifestly be inconsistent with the security of the Nation, which had previously established itself on the adjoining or neighbouring bank. Upon the like considerations of security, islands which have been formed by the accumulation of mud

Right of Contiguity.

[32] Dig., l. XL. t. 1. § 7.

[33] Inst. II. tit. 1. § 22.

and drift at the mouth of a river, and which keep sentinel as it were over the approaches to the mainland, are regarded as natural or necessary appendages of the Coast on which they border, and from which they are formed. "Consider," says Lord Stowell in the case of certain islands at the entrance of the River Mississippi, "what the consequences would be, if lands of this description were not considered as appendant to the mainland, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other Power may occupy them, they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least, that they might be so occupied by European Nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to shew, that these islands are not to be considered as part of the Territory of America[34]."

Arcifinious States.

§ 124. A title to Territory by reason of contiguity, (ratione vicinitatis), in the case of *arcifinious* States, so called according to Varro[35] because their territory admits of boundaries fit to keep the enemy out, (fines arcendis hostibus idoneos), in other words, of States whose territory admits of practical limits, such as rivers and mountains, is *a reciprocal title.* In such cases each State has an equality of right, so that the watershed-line or line of greatest elevation in the case

34 The Anna, 3 Robinson's Rep. p. 385.

35 Grotius adopts the derivation of Varro. His Commentator Barbeyrac approves the etymology given by Gronovius, namely, because such lands had no boundaries (fines) fixed and determined by any artificial measure. De Jure Belli et Pacis, L. II. c. 3. c. 3. § 16.

of mountains, and the Thalweg or mid-channel, in the case of rivers, which corresponds to a line drawn along the lowest part of the bed of the river or the line of deepest depression, forms the juridical boundary between two such States. The practice of Nations has conformed to this principle in regard to territory which is not arcifinious, in cases where there is intermediate vacant land contiguous to the settlements of two nations. Each Nation has an equal title to extend its settlement over the intermediate vacant land, and thus it happens that the middle distance satisfies the juridical title, whilst it is the nearest approximation to a natural boundary, and the most convenient to determine. Thus the United States of America in their discussions with Spain respecting the Western boundary of Louisiana, contended that "whenever one European Nation makes a discovery, and takes possession of any portion of that Continent, (America,) and another afterwards does the same at some distance from it, when the boundary between them is not determined by the principle above mentioned, (namely, that when a Nation takes possession of an extent of sea-coast, it has a right of possession over the interior country coextensive with the waters of the rivers emptying within that coast), the middle distance becomes such of course[36]."

So, in the case of a river, the opposite banks of which are possessed by different Nations, the Thalweg or mid-channel is the Normal water-boundary between them. Circumstances however may create exceptions, as for instance, when the control of a district not actually reduced into the possession of a Nation, is necessary for its security, and is not essential to the security of the conterminous State. "No Nation," writes Vattel, "can lawfully appropriate to herself a

[36] British and Foreign State Papers, 1817–18. p. 328.

too disproportionate extent of country, and reduce other Nations to want subsistence and a place of abode. A German Chief in the time of Nero said to the Romans, 'As Heaven belongs to the Gods, so the Earth is given to the human race, and desert countries are common to all[37],' giving those proud conquerors to understand that they had no right to reserve and appropriate to themselves a country which they left desert. The Romans had laid waste a chain of country along the Rhine, to cover their provinces from the incursions of the Barbarians. The remonstrance of the German Chief would have had a good foundation, had the Romans pretended to keep without reason a vast country which was of no use to them; but those lands which they would not suffer to be inhabited, serving as a rampart against foreign Nations, were of considerable use to the Empire[38].'"

Discovery of the New World.

§ 125. "There is another celebrated question," writes Vattel, "to which the discovery of the New World has given rise. It is asked whether a Nation may lawfully take possession of some part of a vast country in which there are none but erratic Nations, whose scanty population is incapable of occupying the whole. We have already observed in establishing the obligation to cultivate the Earth, that those Nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and legal possession, and the people of Europe too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual or constant use, were lawfully entitled to take possession of it, and settle it with colonies.

37 Sicut cœlum Diis, ita terras generi mortalium datas; quæque vacuæ, eas publicas esse.

38 Droit des Gens, L. II. § 86.

The Earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence. If each Nation had from the beginning resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our Globe would not be sufficient to maintain a tenth part of its present inhabitants. We do not therefore deviate from the views of Nature in confining the Indians within narrow limits[39]." Vattel has elsewhere observed, "Those who still pursue this idle mode of life, (namely, who to avoid labour choose to live by hunting and by their flocks,) usurp more extensive territory than with a reasonable share of labour they would have occasion for, and have therefore no reason to complain if other Nations, more industrious and more closely confined, come and take possession of part of those lands. Thus, though the conquest of the civilised empires of Peru and Mexico was a notorious usurpation, the establishment of many Colonies on the Continent of North America, might, on their confining themselves within just bounds, be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them[40]."

§ 126. "On the discovery of this immense Continent," to quote the words of Chief Justice Marshall[41], "the great Nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior Genius of Europe might claim an ascendency. The

Settlements in the New World.

39 Droit des Gens, L. I. § 209.
40 Ibid. § 81.
41 Johnson v. McIntosh. 8 Wheaton, p. 573.

Potentates of the Old World found no difficulty in convincing themselves that they made ample compenpensation to the inhabitants of the New World, by bestowing on them Civilisation and Christianity in exchange for Independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the Right of Acquisition, which they all asserted, should be regulated as between themselves. This principle was, that Discovery gave title to the Government, by whose subjects or by whose authority it was made, against all other European Governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the Nation, making the discovery, the sole right of acquiring the soil from the Natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others all assented. Those relations, which were to exist between the Discoverer and the Natives, were to be regulated by themselves. The Right thus acquired being exclusive, no other Power could interfere between them."

"In the establishment of these relations, the Rights of the original Inhabitants were in no instance entirely disregarded, but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their Rights to complete Sovereignty, as Independent Nations, were necessarily diminished, and their power to dispose of

the soil at their own will to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the Right of the Natives, as occupants, they asserted the ultimate dominion to be in themselves; and obtained and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the Natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian Right of Occupancy."

Possessory Right of Native Indians.

§ 127. The United States have consequently adhered to the customary rule amongst European Nations with regard to Territorial Title. "The title of the European Nations," says Chancellor Kent[42], "and which passed to the United States, to this immense Territorial Empire was founded on Discovery and Conquest; and by the European customary Law of Nations, prior discovery gave this title to the soil, subject to the Possessory Right of the Natives, and which occupancy was all the Right which European conquerors and discoverers, and which the United States, as succeeding to their title, would admit to reside in the native Indians. The principle is, that the Indians are to be considered merely as occupants, to be protected while in peace in the possession of their lands; but to be incapable of transferring the absolute title to any other than the Sovereign of the country, who has an exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest."

Agriculture in relation to pasture.

§ 128. The question whether agriculturists and manufacturers have a right on abstract principles to expel shepherds from their pasture-grounds, or

[42] Commentaries on American Law, B. I. p. 258.

hunters from the territory over which they range in pursuit of game, or to contract the limits within which they shall exercise their avocations, has thus been discussed by Vattel[43]: "Families which wander in a country, as pastoral people, and which range through it as their wants require, possess it in common. It belongs to them, to the exclusion of all other Nations, and we cannot without injustice deprive them of the tracts of country of which they make use. But let us here recollect what we have said more than once[44]. The Savages of America had no right to appropriate all that vast Continent to themselves, and since they were unable to inhabit the whole of those regions, other Nations might, without injustice, settle in some parts of them, provided they left the Natives a sufficiency of land. If the pastoral Arabs would carefully cultivate the soil, a less space might be sufficient for them. Nevertheless no other Nation has a right to narrow their boundaries, unless it be under an absolute want of land. For in fact they *possess* their country; they make use of it after their manner; they reap from it an advantage suitable to their mode of life, respecting which they have no laws to receive from any one. In a case of pressing necessity, I think, people might without injustice settle in a part of that country, on teaching the Arabs the means of rendering it, by the cultivation of the Earth, sufficient for their own wants and those of the new inhabitants."

The Indian Title.

§ 129. This question has been treated with great lucidity and moderation in a judgment of Chief Justice Marshall[45]; "Although we do not mean to engage

43 L. II. § 97.

44 L. I. § 81. and § 209. L. II. § 86.

45 Johnson and Graham's lessee against McIntosh. 8 Wheaton, p. 589.

in the defence of those principles which Europeans have applied to Indian Title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

"The Title by Conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious Nation, and become subjects or citizens of the government with which they are connected. The new and old members of the Society mingle with each other; the distinction between them is gradually lost, and they make one People. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

"When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

"But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.

To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and high spirited as they were fierce, and were ready to repel by arms every attempt on their Independence.

"What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword; and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct Society; or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

"Frequent and bloody wars in which the Whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil to which the Crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the Sovereign Power, and taken possession of by persons who claimed immediately from the Crown, or mediately, through its grantees or deputies.

"That Law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new

and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

"However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the Law of the Land, and cannot be questioned. So too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to Natural Right, and to the usages of Civilised Nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by Reason, and certainly cannot be rejected by Courts of Justice."

Derivative Acquisition.

§ 130. *Derivative Acquisition* as distinguished from *Original Acquisition* results from Indirect or Direct Cession. Indirect Cession takes place, when a Nation vanquished in war abandons a territory, and the Nation which has overrun it remains in possession of it. *Direct Cession*, on the other hand, is announced by some Act of a declaratory nature, whereby a Nation explicitly devolves its territorial rights to another Nation. The object of Direct Cession is sometimes to prevent a war, but most frequently to cement a peace. The repeated occurrence of such Direct Cessions in later times has led Jurists to make a distinc-

tion accordingly between Acts which place on record such Cessions, and Treaties properly so called. "The compacts," writes Vattel,[46] "which have temporary matters for their object are called agreements, conventions, and pactions. They are accomplished by one single Act and not by repeated Acts. The compacts are perfected in their execution once for all; treaties receive a successive execution whose duration equals that of the treaty." Martens,[47] to the same purport writes, "On divise ensuite en général les traités en *conventions transitoires*, qui s'accomplissent d'un seul coup, et en *traités proprement dits*, qui obligent à des prestations successives, quoique dans la pratique on ne suive pas toujours cette distinction dans le choix des termes dont on désigne les arrangemens faits entre les nations. Les traités de cession, de limites, d'échange et ceux même qui constituent une servitude de droit public, ont la nature des conventions transitoires; les traités d'amitié, de commerce, de navigation, les alliances égales et inégales, ont celle des traités proprement dits (fœdera). Les conventions transitoires sont perpetuelles par la nature des choses, de sorte qu'une fois accomplies, elles subsistent indépendamment des changemens survenus dans la personne du monarque, dans la forme du gouvernement, et même dans la Souverainté de l'état contractant, tant qu'elles n'ont pas été mutuellement revoquées; une guerre même, survenue pour un autre motif, ne les fait pas tomber *d'elles mêmes*, quoiqu'elle autorise à en suspendre l'effet et quelquefois à les revoquer." To the same effect, Mr. Wheaton[48] says, "General Compacts between Nations may be divided into what are called *transitory conventions* and *treaties* properly so called.

[46] L. II. § 163. [47] Précis de Droit des Gens, § 58.
[48] Elements of International Law, Part II. c. 4. § 9.

The first are perpetual in their nature, so that, being once carried into effect, they subsist independent of any change in the Sovereignty and form of Government of the Contracting Parties, and although their operation may in some cases be suspended during war, they revive on the return of peace without any express stipulation. Such are *treaties of cession, boundary, or exchange of territory*, or those which create a permanent servitude in favour of one Nation within the territory of another."

Title by Cession.

§ 131. In the case of Indirect Cession, which takes place by abandonment to an invading enemy, a confirmation of it is for the most part supplied by a subsequent treaty of peace concluded on the basis of "*uti possidetis*," whereby it is agreed that either Nation shall remain in possession of the territory which it has acquired during the war. But such Indirect Cession, although it remains incomplete during the war, seeing that there may be a change at any moment in the fortune of arms, does not require any such explicit confirmation in order to make it complete. If peace be concluded, without any stipulation for the restoration of territory on either side, the Nation which has wrested during the war a town or a province from another Nation, acquires a lawful title to it by the conclusion of a treaty of peace with that Nation. The conclusion of the treaty of peace without reference to any restitutions is a tacit consent on the part of the Nation, from which a town or province has been wrested, that it should permanently remain in the hands of the conqueror; seeing that the worsted nation undertakes by concluding peace not to have recourse to force of arms for the recovery of its former possessions. "The effect of a treaty of

peace," writes Vattel,[49] "is to put an end to the war, and to abolish the subject of it. It leaves the Contracting Parties no right to commit any acts of hostility, on account either of the subject itself which had given rise to the war, or of anything that was done during its continuance; wherefore they cannot lawfully take up arms again for the same purpose." Title by Conquest thus resolves itself *juridically* into Title by Cession, and it is not the superior power of the conqueror which gives right to his conquest, but it is the consent of the conquered, which ultimately sanctions the conqueror's right of possession.

49 Lib. IV. c. 2. § 19. Grotius de Jure B. et P. L. III. c. 9. § 4. and c. 20. § 10.

CHAPTER VIII.

RIGHTS OF POSSESSION.

The Territory of a Nation—Extension of Territory—Empire a primary Territorial Right—Empire distinct from Domain—Empire over things which cannot be appropriated—Empire over Territorial Rivers—Modification of Right of Empire by Compact—Empire over Frontier Rivers—Treaty Stipulations as to use of Frontier Rivers. Conventional Law of Europe as to Great Rivers—The Thalweg or Midchannel the boundary of Conterminous States—Right of Alluvion—Prescriptive Rights over Rivers—The Stade or Brunshausen Toll.

The territory of a Nation.

§ 136. HAVING considered in the previous chapter the conditions under which a Nation may rightfully acquire possession of a country, we may proceed to consider the rights which a Nation may exercise by virtue of such possession; in other words, the *jura possessionis*, as distinguished from the *jus possidendi*. "When a Nation," writes Vattel[1], "takes possession of a country, it is considered as acquiring the empire or sovereignty over it at the same time with the domain[2]. For since the Nation is Free and Independent, it cannot be its intention in settling in a country to leave to others the right to command, or any of those rights which constitute Sovereignty. The whole space over which a Nation extends its government becomes the seat of its jurisdiction, and is called *its territory*." To the same effect De Wolff writes, "Si gens quædam regionem vacuam occupat, imperium in ea simul occupat[3]."

[1] Droit des Gens, L. I. § 205.

[2] In his autem, quæ proprie nullius sunt, duo sunt occupabilia, imperium et dominium quatenus ab imperio distinguitur. Grotius de Jure B. et P. L. II. c. 3. § 4.

[3] Jus Gentium, § 85.

Extension of Territory.

§ 137. It is immaterial for the purposes of Empire as between Nations, whether a Nation acquires possession of a country by extending its political body coordinately, or by founding subordinate Political Bodies in the nature of Dependencies. Thus the Union of the North American States has extended itself over the North American Continent, by the admission of Coordinate States into the Union, on a footing of equality with the older and Sister States; whereas the monarchical States of Europe have extended themselves by Colonisation or by founding new States in Dependence upon themselves as Parent States. The political peculiarities, which distinguish these different forms of National growth, as practised by the Nations of the New World and the Old World respectively, are notable; but they are matters which concern the Internal organisation of States, and have no necessary bearing upon their International relations. The founding of a new State in a condition of Political Dependence upon the Mother Country, constitutes as much an extension of a Nation's territory in regard to other Nations, as the incorporation of a new State into a National system of Coordinate States. In both cases the Nation consists of the aggregate body of States, and in the language of arithmeticians, the International Unit may be said to be a multiple political number, of which the component States are in the one case all whole numbers, and in the other case are one or more whole numbers and several fractions of a whole number.

Accordingly, when a Nation takes possession of a distant country and settles a colony there, that Country, though separated from the principal establishment or Mother Country, naturally becomes a part of the State equally with its ancient possessions.

Whenever, therefore, the Political Laws or Treaties make no distinction between them, anything said of a Nation must also apply to its Colonies[4].

Empire a primary territorial right.

§ 138. The exercise of Empire as between Nations is thus an incident of territorial possession. Empire is in fact a primary territorial right, and the Empire of a Nation is supreme *ratione loci* over every person and every thing within its territory. "Quicquid est in territorio, est de territorio[5]." Its operation however is sometimes suspended by Comity or by Compact, but a claim of extra-territoriality, or of immunity from the Law of the territory *(lex loci)*, is strictly exceptional; the general presumption of the *Jus inter Gentes* being adverse to it. There are cases however in which the *Comity* of Nations has suspended the exercise of certain rights of Empire (Jura imperii)[6] so uniformly, that a *Custom* has grown up whereby the *exception* has acquired the character of *Law;* as for instance in regard to the immunity from the *Lex Loci*, which is extended to the Public Ministers of Foreign Princes, notwithstanding they should be permanently resident within the territory of another Nation, and thereby *normally* subject to its Empire.

Empire distinct from dominion.

§ 139. The Right of Empire or Jurisdiction is distinguished from the Right of Dominion or Property. When a Nation takes possession of a vacant tract of land, it acquires under ordinary circumstances the Dominion or fullest Right of Property over it concurrently with the Right of Empire. "Si gens regionem quandam occupavit, omnis terra et quæ in ea

4 Vattel, L. I. § 210.

5 Heffter, § 67.

6 Dominus territorii non permittere intelligitur peregrinis, ut in territorio suo versentur, vel ibidem commorentur, nisi sub hac conditione ut legibus loci subsint eorum actiones. Wolffii Jus Gentium, § 299. Grotius, L. II. c. 11. § 2.

sint, in dominio ipsius sunt[7]." This Right of Dominion or Property gives to a Nation a right to exclude all other Nations from the enjoyment of the territory of which it has taken possession, and its Right of Empire warrants a Nation to enforce its own sanctions against all who would intrude upon its territory. Although, however, the Right of Empire accompanies the Right of Property in the case of International Possession, they are not necessarily concurrent rights[8], but the Right of Empire may be enjoyed by a Nation over certain things, in which it is incapable of acquiring an absolute Right of Property. "Acquiri imperium potest, etsi res singulæ naturâ in dominium venire non possunt[9]."

Empire over things which cannot be appropriated.

§ 140. The Roman Jurists regarded certain things as incapable by nature of being appropriated. "Et quidem naturali Jure communia sunt omnium hæc, aer, aqua profluens, et mare, et per hoc litora maris[10]." It is obvious that the air, running water, and the sea, are not susceptible of detention, and consequently cannot be physically reduced into possession, so as to give rise to that permanent relation, which is implied in the Juridical notion of property. "Again Nature does not give to man a right of appropriating to himself things which may be innocently used, and which are inexhaustible and sufficient for all. For since those things, while common to all, are sufficient to supply the wants of each, whoever should, to the exclusion of all other participants, attempt to render himself sole proprietor of them, would unreasonably seek to wrest the bounteous gifts of Nature from the

7 Wolff, Jus Gentium, § 274.

8 Gunther, L. II. § 17.

9 Quamquam autem plerumque uno actu quæri solent imperium et dominium, sunt autem distincta. Grotius, L. II. c. 3. § 4. 2.

10 Just. Inst. L. II. Tit. I. § 1.

parties excluded[11]. There is accordingly no warrant of Natural Law for an absolute Right of Property in the running water of rivers (aqua perennis) any more than in the tidal water of the sea. But if the free and common use of a thing of this nature (namely which is of itself inexhaustible) be prejudicial or dangerous to a Nation, the care of its own safety will entitle it so far, and so far only, to control the use of it by others, as to secure that no prejudice or danger result to itself from their use of it. A Nation may accordingly have a *Right of Empire* over things which are nevertheless by nature *communis usûs*, and over which it cannot acquire an absolute *Right of Property;* as, for instance, over portions of the High Seas, or over rivers which form the boundary of its territory. The limits, within which the safety of a Nation warrants such an exercise of Empire, will be considered hereafter.

Empire over Territorial Rivers.

§ 141. A river, of which both banks are in the possession of one and the same Nation, may be regarded as a stream of water contained in a certain channel, which channel forms part of the territory of the Nation[12]. Such water accordingly, whilst passing through the territory of a Nation, is subject, like all other things within its territory, to the Empire of the Nation, and those who navigate upon it are subject to the Jurisdiction of the Nation *ratione loci*. The exercise of the Right of Empire over such a river by a Nation, whilst it flows through its territory, does not in any wise militate against the use of it as running water by other Nations, or conflict with the exercise of their corresponding Right of Empire over it, whilst it flows through their respective territories. We find accord-

[11] Vattel, L. I. § 286.

[12] Grotius de Jur. B. et P., L. II. c. 14. § 7.

ingly by the practice of Nations, that a Nation having physical possession of both banks of a river is held to be in juridical possession of the stream of water contained within its banks, and may rightfully exclude at its pleasure every other Nation from the use of the stream, whilst it is passing through its territory, and this rule of Positive Law holds good whatever may be the breadth of a river. Moreover, the fact, that other Nations have freely navigated the stream before both banks of a river have come into possession of one and the same Nation, will not control the operation of this rule. Thus the recognition of the Independence of the Seven United Provinces by the peace of Munster on the part of Spain[11] (Jan. 30, 1648) carried with it the recognition of their right to close the navigation of the River Scheldt in all its branches within their territory. The same rule was applied to the stream of the Mississippi, below the point where the Southern Boundary of the United States struck that river, by Spain, after the Spanish Nation had acquired possession of both banks, although the navigation of the entire river had been previously common to all Nations whilst it formed a common Boundary of the French and British Possessions. The United States of North America contested at first the claim of Spain, but were fain to conclude the dispute by the Convention of San Lorenzo el Real,[12] under which the free navigation of the entire river was conceded by Spain to citizens of the United States in common with subjects of Spain. At a subsequent period after Louisiana and Florida had been ceded to the United States, the entire river became included within the Territory of the North

[11] Schmauss, Corp. Jur. Gent. I. p. 618.
[12] Martens, Recueil, VI. p. 146.

American Union; the United States have thereupon asserted in their turn their Right of Exclusive Use over the entire stream, and have, in virtue of their Right of Possession, prohibited all other Nations from the navigation of any portion of the river. In a similar manner Great Britain maintains her exclusive right over the stream of the St. Lawrence during its passage through British Territory. By the Treaty, however, of Washington[13] (5 June, 1854), Great Britain has agreed, that the citizens and inhabitants of the United States shall have the right of navigating the river St. Lawrence and the canals in Canada used as the means of communication between the great Lakes and the Atlantic Ocean, as fully and freely as the subjects of her Britannic Majesty, it being understood, however, that the British Government, retains the right of suspending this privilege on giving due notice thereof to the Government of the United States.

It may be observed in regard to this *Right of Exclusive Use*, which a Nation that is in possession of both banks exercises over the stream of a navigable river, that a Nation so established has a physical power of constantly acting upon the stream, and of excluding at its pleasure the action of any other Nation, which power constitutes Juridical Possession. On the other hand the stream, whilst it is included within the territory of a Nation, cannot be considered to be destined by the Creator to continue open to the common use of mankind any more than the banks and adjacent lands, which have been appropriated and so withdrawn from common use. Nature would thus appear to have interposed neither a material

[13] Martens, N. R. Gén. Tom. XVI. p. 502. This Convention is to remain in force for ten years, and further, until the expiration of twelve months after either Nation shall give notice to the other of its wish to terminate the same.

obstacle nor a moral impediment to the *exclusive use* of a navigable river on the part of a Nation within certain territorial limits. That a river, whilst it flows through the territory of a Nation, should be regarded in any other light than as part of its Possessions, would seem to be inconsistent with the integrity of its territory, whilst it might be incompatible with its security, if the use of the river was not subject to its exclusive control.

Modifications by Compact.

§ 142. The exercise on the part of a Nation of its right to exclude other Nations from the use of its territorial waters has often been modified either expressly or implicitly by Compact. Thus Spain, being in possession of both banks of the river Mississippi for some distance upwards from the sea, conceded to the citizens of the United States by the Treaty of San Lorenzo el-Real, (anno 1795,) the free navigation of the river, from its source to its mouth, reserving however the power to extend the same privileges to the subjects of other Powers by a Special Convention. In a similar manner it was agreed between Great Britain and the United States by the Eighth Article of the Treaty of Paris (17th Sept. 1783),[14] "that the navigation of the river Mississippi, from its source to the Ocean, should for ever remain free and open to the subjects of Great Britain and the citizens of the United States." "The subsequent acquisition," writes Wheaton, "of Louisiana and Florida by the United States having included within their territory the whole river from its source to the Gulf of Mexico, and the stipulation in the Treaty of 1783, securing to British subjects a right to participate in its navigation, not having been renewed by the Treaty of Ghent

[14] Martens Recueil, III. p. 559.

in 1814, the right of navigating the Mississippi is now vested exclusively in the United States."[15]

Empire over Frontier Rivers.

§ 143. A Nation which has established itself on one of the banks of a river, prior to the occupation of the opposite bank by any other Nation, may, with a view to its own security, reduce the channel of the river into possession without occupying the other bank.[16] It may for this purpose either station an armed fleet upon its waters, and thereby occupy the fairway of the river, or it may erect armed forts upon its own bank, and thereby command the fairway, and in either case it will be able effectively to exclude other Nations from the use of the river. Thus the Romans became sole masters of the Rhine, the Danube, and some other rivers, because the barbarians who inhabited on the other bank having no boats, the Romans constantly kept what they called "naves lusoriæ" upon them. So likewise the Republic of Paraguay in South America has established its possession of the channel of the river Paraguay which separates the territory of Paraguay from El Gran Chaco,[17] and the Republic of Paraguay claims by right of established possession to exclude not merely the Indians of El Gran Chaco who inhabit the opposite bank, but Nations of European origin, such as the Brazilian Nation which possesses the upper part of the river, and the Argentine Confederation which is in possession of the lower part of the river, from navigat-

[15] Wheaton's Elements, Part II. c. 4. § 18.

[16] Wolffii Jus Gentium, § 106. Vattel, Droit des Gens, L. I. § 266.

[17] The Indians of the Chaco have no canoes. The river throughout the extent of Paraguay is occupied by a river-police stationed by the government of Paraguay on board of *guardias* and *piquetes*, each occupied by from six to twelve men. La Plata and the Argentine Confederation and Paraguay, by Thomas J. Page, U. S. N. London, 1859. p. 108.

ing that portion of the river which separates the Republic of Paraguay from the territory of the warlike Chaco tribes.[18] That a Nation which is settled on one of the banks of a river may nevertheless have a Right of Empire over the entire river, is thus noticed by Grotius. "But though, as I have said in case of any doubt, the jurisdictions on each side reach to the middle of the river that runs between them, yet it may be, and in some places it has actually happened, that the river belongs wholly to one party, either because the other Nation had not yet possession of the other bank till later, when their neighbours were already in possession of the whole river, or else because matters were so stipulated by some treaty."[19] The sanction, which Usucaption or established possession in such a case gives to the claim of a Nation to exclude other Nations from the use of a river, has not been overlooked by Vattel: "A long and undisputed possession establishes the Right of a Nation, otherwise there could be no peace, no stability between them, and notorious facts must be admitted to prove Possession. Thus, when from time immemorial a Nation has without contradiction exercised the Sovereignty upon a river which forms its boundary, nobody can dispute with that Nation the supreme dominion over it.[20]

Treaty Stipulations as to Frontier Rivers.

§ 144. Grotius has remarked that a Riverain State may have jurisdiction over the entire channel of a river, to the exclusion of other Riverain States, "because matters have been so stipulated by some Treaty." A remarkable instance of this occurs in the Treaty of

[18] The warlike Chaco tribes have alone, amid the degradation of the native races upon the American Continent, defied for more than three centuries the power of the white man.

[19] De Jure B. et P. L. II. c. 3. § 18.

[20] Droit des Gens, L. I. § 166.

St. Germain en Lay (29 March, 1679), whereby the King of Sweden ceded to the elector of Brandenburg all his possessions on the right bank of the Oder, retaining his possession of the left bank, and whereby it was further expressly provided, that the river Oder itself should for ever remain under the Sovereignty of the Crown of Sweden, and that the Elector of Brandenburg should not erect any fortifications upon the bank ceded to him[20]. This exceptional arrangement had its origin most probably in the previous dispositions of the Treaty of Westphalia, by which the Sovereignty of the Crown of Sweden over the river Oder was secured for ever, and with which, as forming part of the Public Conventional Law of Europe, the Treaty of St. Germain en Lay was made to accord.

Treaties, whereby a river has been ceded in its entirety (en entier) have been held to transfer not only the possession of the entire channel of the river, but both its banks as inseparable accessories to the river. Thus by the Treaty of Warsaw (18 Sept. 1773), Poland agreed that the entire river Netze should belong to Prussia, and Prussia contended, and was ultimately successful in her contention, that the cession of the entire river implied the cession of the stream and both its banks. By a like interpretation, Sweden having obtained under the Treaty of Osnabruck (24 Oct. 1648) the cession of the entire river Oder from the Emperor of Germany, was held to have acquired thereby possession of a margin of two German miles on the further bank, as an inseparable accessory to

[20] La rivière de l'Oder, suivant les dispositions des traités de Westphalie, demeurera toujours en souveraineté au Roi et à la couronne de Suède, et il ne sera pas libre au dit Electeur de Brandenbourg d'ériger aucune forteresse ou de fortifier aucune place dans l'entrevue du Pays qui lui est cédé par le présent Traité.—Dumont, Corps Diplomatique, XIII. p. 408.

the stream. To what extent the use of the land on the bank or banks of a river may be regarded as accessory to the use of the stream, has been a subject of dispute. Prussia, in her dispute with Poland respecting the effect of her cession of the river Netze *en entier*, went so far as to claim all such portions of the opposite bank as the waters of the river in a state of inundation overflowed, as well as the marshes caused by such inundations, which claim Gunther[21] considers to have been in conformity with usage.

It is obvious however that such a principle, if generally applied, might lead to great complications. A different and a more definite principle was adopted by Russia in the Treaty of Adrianople concluded with the Ottoman Porte[22] (24 Sept. 1829). By this Treaty, the Porte in effect ceded the river Danube between the Pruth and the Black Sea in its entirety to Russia, for it was provided by Article III, that the frontier line should follow the course of the Danube from the confluence of the Pruth to the St. George's mouth, leaving all the Islands in possession of Russia, and the right bank of the Danube in possession, as heretofore, of the Porte. But it was further agreed that from the point where the St. George's branch separated from the Sulina branch of the Danube, the right bank of the river should remain uninhabited for the distance of two hours[23], and that no establishment of any kind should be formed upon it within that limit. Such a provision, whilst it effectively secured the navigation of the river from any control on the part of the Porte by virtue of its possession of the southern bank of the Danube, did not tend in any way to impair the

[21] Gunther, t. II. § 14.

[22] Martens, N. R., t. VIII. p. 144.

[23] 'Deux heures,' probably about two German miles, 'Zwei Stünde.'

integrity of the Porte's possession of that bank. On the other hand, the rule of interpretation, whereby the cession of a river *en entier* implies the cession of both its banks, as contended for by Prussia in the case of the river Netze, might operate to deprive a Nation of an important land-frontier, whilst it has in terms only ceded possession of a water-frontier.

Conventional Law as to the great rivers of Europe.

§ 145. It was formerly the policy of Nations to consider rivers, equally with mountains, to be natural barriers, and to regard them as turned to the most useful purpose when employed as lines of international demarcation. Thus Grotius, borrowing a term of Law from the Civilians, writes, "But in any doubt of the bounds of a State, those lands that reach to some river are to be reckoned as *arcifinious*, because nothing is so proper to distinguish jurisdiction as that which is of such a nature that it is not easily passed over[24]." The exclusive right to the use of a river has been accordingly maintained with great jealousy by Nations, as an important international right, seeing that a river might under such circumstances be converted into a fortified frontier. The Conventional Law of Europe has, in modern times, been adapted to larger and less selfish views. Thus the great navigable rivers of the Continent, which in their passage to the Ocean intersect various lands, sometimes passing through Territory in the exclusive possession of one and the same Nation, at another time forming a common boundary between the Territories of two or more Nations, and of which the navigation has been heretofore in some parts totally impeded, and in others so burdened with tolls, that they had ceased to be profitable as highways of commerce, are now regarded as the instruments of Nature to cement the peaceful

[24] De Jure B. et P., L. II. c. 3. §. 17. 2.

relations of mankind, by facilitating their mutual intercourse. It was one of the most beneficial arrangements of the Congress of Vienna, that the Powers there assembled agreed, that the navigable rivers which traversed or separated their respective States, should be open for commercial purposes to the navigation of vessels of all Nations, from the places where they became navigable to their mouths, subject to an uniform system of police and tolls, to be settled by common accord[25]. The Treaty of Paris[26], (30 March 1856,) has applied to the river Danube and its mouths the same rule of law which had been applied by the Christian Powers assembled at Vienna to the rivers within their respective Territories, and has recorded that this arrangement with the Ottoman Porte forms part of the Public Law of Europe. The Right of Empire over any of the great navigable rivers of Europe has thus ceased to confer any exclusive privilege upon the Nation which enjoys that Right; on the contrary, each Riverain State is under a conventional obligation to remove all obstacles to Navigation which may arise in the bed of the river within its Territory, and to maintain the banks and towing paths, and other accessories to the Navigation, in such a condition as will most favour the circulation of the Merchant Vessels of all Nations.

The Thalweg or Midchannel of a River the Boundary of Conterminous States.

§ 146. If the opposite banks of a navigable river are in the possession of two Nations, and neither Nation can prove that itself, or the Nation from which it may have derived its title, was established on the one bank prior to the occupation of the other bank by the other Nation, each will have a Right of Empire and Dominion over the river as far as the *midchannel* or *Thalweg*. "Pour ce qui est des fleuves et

[25] Martens, N. R. II. p. 428. [26] N. R. Général XV. p. 776.

lacs frontières, dont la rive opposée est également occupée, leur milieu, y compris les îles que traverse la ligne du milieu, sépare ordinairement les territoires. Au lieu de cette ligne on a nouvellement choisi pour frontière le *Thalweg*, c'est à dire le chemin variable que prennent les bateliers, quand ils vont aval, ou plutôt le milieu de ce chemin".[26] Grotius and Vattel speak of the *middle of the river* as the line of demarcation[27] between two jurisdictions; but modern publicists and statesmen prefer the more accurate and more equitable boundary of the *Midchannel*. If there be more than one channel of a river, the deepest channel is the Midchannel for the purposes of territorial demarcation; and the boundary line will be the line drawn along the surface of the stream corresponding to the line of deepest depression of its bed. Thus we find in the Treaty of Argovie, (17 Sept. 1808,) concluded between the Grand Duchy of Baden and the Helvetic Canton of Argovie,[28] that the *Thalweg*, or water-frontier line, is defined to be "the line drawn along the greatest depth of the stream," and as far as bridges are concerned, "the line across the middle of each bridge." The islands on either side of the Midchannel are regarded as appendages to either bank;[29] and if they have once been taken possession of by the Nation to whose bank they are appendant,

[26] Klüber, Droit des Gens, § 133.

[27] Grotius, L. II. c. 3. § 18. Vattel, L. c. 22. § 266.

[28] Martens, N. R. T. I. p. 140.

[29] Such is the general law, but by treaty the midchannel may be made the water-boundary, yet all the islands in the river belong to one Power. Thus by the Convention of 9 Feb. 1776, between the King of Poland and the Empress Maria Theresa, all the islands in the river Vistula, within the limits of the Convention, with the exception of that in which the town of Casimir is situated, were ceded to her Imperial and Royal Majesty, whilst half the bed of the river was declared to belong to each Power. Martens, Recueil, T. II. p. 127.

a change in the Midchannel of the river will not operate to deprive that Nation of its possession, although the water-frontier line will follow the changes of the Midchannel—" Dans les fleuves navigables, c'est le courant du fleuve qu'on a communément en vue, en convenant de prendre le milieu pour limite. Cette limite change donc si le courant change : ce qui cependant n'influe pas sur la propriété des autres parties une fois acquise. Mais dans le cas où un fleuve changerait totalement le lit, le lit desséché resterait partagé entre les deux nations, comme l'était le fleuve. Les simples atterrissemens n'altèrent pas la ligne qui sert de limite."[30] " A river," writes Grotius, " that separates two Empires is not to be considered barely as water, but as water confined within such and such banks and running in such and such a channel ; therefore the addition, subtraction, or such changes of its particles, as allow the whole to subsist in its ancient form, allows the river to be considered as the same. But if the form of the whole be changed at once, it will be quite another thing ; and consequently, if a river is dammed up above, and a passage made to convey the water another way, the river ceases to be. So in case a river should force its way through some unusual passage, and entirely forsake its former channel, it is no longer the river that it was before, but a new river. So, too, if a river should have become dried up, the middle of the channel would remain, as before, the boundary of Empire between two Nations, because the intention of each Nation must be presumed to take the river for the natural limit of their lands, but if the river should at any time cease to be, then to possess respectively what

[30] Martens, Précis du Droit des Gens, § 39.

they had before: the same rule is to be observed if the channel should be changed.[31]

Right of Alluvion.

§ 147. When a river is the boundary between two Nations, whether its channel remains common to the inhabitants of either bank, or whether each Nation possesses half of it, the respective rights of the two Nations are not in any wise changed by *alluvion*, that is by a gradual addition of soil made by the current of the river to the bank on either side.[32] If therefore it happens that by the natural effect of the current, one of the two banks receives an increase of soil, while the river gradually encroaches on the opposite bank, the river still remains as heretofore the boundary between the two Nations, and notwithstanding the progressive changes in its course, each retains over it the same rights as heretofore. So that, if for instance its possession be equally divided between the owners of the opposite banks, the midchannel, or *Thalweg*, although its distance from the respective banks may be no longer the same by reason of the alluvial increase of the one bank and the denudation of the other bank, continues to form the line of demarcation between the two Nations.

Prescriptive Rights over Rivers.

§ 148. A river may belong to one Nation and another Nation may have an incontestable right to navigate it, in which case the former cannot erect upon the river any work which will entirely interrupt and render it unfit for navigation. The right to navigate such a river may have been acquired by the Nation, which is not in possession of the river, either by prescription founded on the long acquiescence of the other Nation, if it ever had the right to exclude other Nations from the navigation, or by a privilege

[31] De Jure B. et P., L. II. c. 3. § 17.

[32] Grotius, L. II. c. 3. § 16. Vattel, L. I. § 268, 269.

granted by a common paramount Sovereign. It may happen, that conterminous Independent States, separated by a river, have been subject in former times to a common paramount Lord or Sovereign, such for instance as the Princes and Free Cities of Germany formerly recognised in the Roman Emperor of the Germans, who in virtue of his Supremacy could rightfully grant to them by Charter or otherwise the exercise of dominion and jurisdiction over a river within the Empire. Thus a Right of *Condominium*[33] over the Rhine was granted by the Roman Emperor of the Germans to the Electors of Mayence, Trèves, Cologne, and the Elector Palatine, and a Right of Supreme Dominion over the Maine was similarly granted to the Elector of Mayence. In an analogous manner the right of levying tolls, which was an Imperial Right, was granted to Riverain States of the Empire, and tolls have been accordingly levied by them upon vessels navigating the rivers which bound or intersect their territory; at the same time that exceptional privileges of freely navigating such rivers were granted by the same Supreme Authority to one or more other States of the Empire, and have continued to be enjoyed by them since they have become Independent Nations.

The Stade or Brunshausen Toll.

§ 149. The Stade or Brunshausen Toll, levied by Hanover on the vessels and goods of Foreign Nations ascending the river Elbe from the Sea is an instance of the Right of Empire exercised under qualifications. The origin of this toll is lost in antiquity. The earliest document, in which it is mentioned, is a charter of the Emperor Conrad II, dated December 10, 1038, which grants the then existing toll levied near the place of Stade to the Archbishops of Bremen, which Grant was confirmed by the succeeding Emperor Henry III, on 13 May, 1040. His successor the Em-

33 Gunther, T. II. § 14.

peror Henry IV, annexed the County of Stade with all the tolls and duties then levied to the Archbishopric of Bremen. The right thus conveyed existed in all its generality until the Emperor Frederic I, on the 7th May, 1189, granted to the citizens of the old Town of Hamburgh, at the instance of Count Adolphus of Schaumburg, the privilege of their ships and goods passing free of the Stade Toll. The exemption enjoyed under this privilege was vigorously contested by the Archbishop, as an infringement upon a vested Right and also upon the property of the Church, but it was ultimately established, on the 8 Dec. 1268, by the superior might of the Hamburgh Burghers, since which time the right of free navigation has been enjoyed by the Burghers of the old Town of Hamburgh down to the present day. By the peace of Osnabruck, (8 Sept. 1648,) Bremen, which had been erected into a Duchy, was transferred to Sweden, and the Stade Toll was levied by the King of Sweden, as Duke of Bremen, down to 1712, when Denmark wrested from Sweden the Duchies of Bremen and Verden, and ceded them to the Elector of Hanover. At the conclusion of the subsequent peace (9th Nov. 1719) the Elector of Hanover was formally invested with the two Duchies by the Emperor of Germany, in the same way as the King of Sweden had been invested after the peace of Osnabruck. From this investiture Hanover claims her right to levy the Stade or Brunshausen Toll. At the time when the Stade Toll was established, the Elbe was a river of the German Empire, and the levying of river tolls was amongst the rights, which by the law and customs of the Empire appertained to the Imperial Crown. It was competent therefore to the Emperor Charles the Great to establish passage-duties upon vessels entering

the mouth of the river Elbe, and it is probable that the then frequented harbour of Stade was one of the places selected by that Emperor. It was equally competent for a subsequent Emperor to grant the Duchy of Bremen with all the tolls therein levied to a Prince of the Empire, and to sanction the ultimate transfer of the Bremen Fief with all its rights to the Elector of Hanover. Upon the devolution of the Supremacy of the Emperor and the Empire to the immediate vassals of the Imperial Crown, the Elector of Hanover and the Free City of Hamburgh became Independent Sovereign Powers, and they continued to enjoy henceforth, in such character, the respective rights and privileges in regard to the navigation of the river Elbe, which they had heretofore enjoyed as immediate vassals of the Imperial Crown. The King of Hanover continued to levy toll upon all vessels entering the river Elbe from the sea, with the exception of vessels belonging to Burghers of the old Town of Hamburgh. The right of Hanover and the privilege of the old Town of Hamburgh had equally a lawful origin, and both had been exercised for so many centuries, that they had acquired the sanction of long established custom as against each other and against other Nations.

After the Powers assembled at the Congress of Vienna had agreed, that the tolls to be taken on the great navigable rivers of Europe should be settled by a common accord amongst the Riverain Powers, the Commissioners of the Elbe-bordering States assembled at Dresden, (3 June, 1819,) for the purpose of settling a scheme of Elbe-tolls. On this occasion Hanover appears to have contended, that the Stade Toll was a *Sea-toll*, as distinguished from a *River-toll;* and consequently was not within the scope of

the Treaty-Engagements of Vienna. A subsequent and more careful investigation, has induced Hanover to admit that the Stade Toll is a River-toll, and it has been accordingly regulated by the Elbe-bordering States under the Convention of Dresden[33], (30 August, 1843.) This toll accordingly, which was originally a territorial toll levied under the authority of the Roman Emperor of the Germans upon all vessels coming from the Sea into a river of the Germanic Empire, has been regulated by a Convention in pursuance of the Treaty-Engagements of Vienna: it has thus been sanctioned by the Conventional Law of Europe. The Stade Toll had beyond all doubt a rightful origin, and its rightful origin has secured its recognition; unlike the Glückstadt toll, which the King of Denmark, as Duke of Holstein, attempted to levy in the Seventeenth Century upon all vessels passing by the Port of Glückstadt, but which the English and Dutch nations[34], and above all the citizens of Hamburgh successfully resisted.

33 Martens, N. R. Géneral, V. p. 530.

34 Treaty of 1645. Schmauss, Corp. Jur. Gent. I. p. 356. Lord Molesworth's Account of Denmark, anno 1692.

CHAPTER IX.

RIGHT OF JURISDICTION.

Incidents of the Right of Empire—National Sovereignty properly Territorial—The Jus Civile of a State operative only within its Territory—The Comity of Nations sometimes gives effect to Foreign Laws—Personal, Real, and Mixed Statutes—Growth of Private International Jurisprudence—Exceptional position of Europeans whilst resident amongst Asiatic Nations—Personal Actions of Foreigners—Extra-territoriality of certain Foreign Persons and Things—Merchant Vessels subject to the Territorial Law—Right of Emigration—Domicil the criterion of National Character—Jurisdiction and Remedies—Comity of Nations in regard to Personal Property—Domicil of Origin and Domicil of Choice.

Incidents of the Right of Empire.

§ 150. THE Empire of a Nation within its own territory is of Natural Right exclusive and absolute: it is susceptible of no limitation not imposed by the Nation itself, for any restriction imposed upon its exercise, deriving force from an external authority, would imply an impairment of a Nation's Independence to the extent of that restriction, and an investment of Sovereignty to the same extent in that Power which had imposed such restriction. All exceptions, therefore, to the free exercise of the Right of Empire by a Nation within its own territory must be derived from the consent of the Nation itself.

The Right of Civil and Criminal Legislation in respect of all property and persons within the territory of a Nation is an incident of the Right of Empire. It follows, therefore, that the Laws of every Nation bind of Natural Right all property situate within its territory, as well as all persons resident therein, whether they be natives or strangers, and that they control and regulate all the acts done, or contracts entered into within its limits.

Every Nation has accordingly an absolute right to order the conditions under which Real or Personal Property situate within its territory may be held or transferred, as well as to determine the capacity of all persons resident therein to enter into Contracts, as well as the formalities requisite to give legal effect to such Contracts, and the rights and obligations resulting thereupon; and finally to prescribe the conditions under which actions at law may be brought before its tribunals, and the remedies which may be administered in its Courts[1].

National Sovereignty properly Territorial.

§ 151. A Nation cannot by its Laws directly bind property which is beyond the limits of its territory, nor directly control persons who are not resident therein. This is a necessary consequence of the proposition advanced in the preceding section; for it would be inconsistent with the absolute character of Territorial Empire, if the Laws of a Nation could bind persons or property within the territory of another Nation, and so control the operation of the Laws of the latter Nation within its own territory. Rodenburg has accordingly observed, that no Sovereign Power can of Right set Law beyond the limits of its territory. "Constat igitur extra territorium legem dicere nemini licere; idque si fecerit quis, impune ei non pareri, quippe ubi cesset Statutorum fundamentum, cessant robur et jurisdictio[2]." Boullenois lays down a similar rule: "Of strict Right, all the Laws set by a Sovereign have only force and authority throughout his dominions[3]." Vattel concurs in this view, when he says, "The Empire united to the

1 Boullenois, Traité des Statuts, T. I. p. 2, 3, 4. Story, Conflict of Laws, § 18, 19. Fœlix, Droit International Privé, § 9.

2 Rodenburg, De Statutis, Tit. I. c. 3. § 1.

3 Boullenois, Traité des Statuts, Principes Généraux, VI.

domain establishes the jurisdiction of the Nation within its territory. It is its province, or that of its Sovereign, to exercise Justice in all the places under its Empire; to take cognisance of the crimes that are committed, and the differences that arise in the country[4]." No Law accordingly is operative, *proprio vigore*, beyond the limits of the territory of the State which has set it[5]. "There is no doubt," writes Chancellor Kent[6], "of the truth of the general proposition, that the Laws of a country have no binding force beyond its own territorial limits, and their authority is admitted in other States, not *ex proprio vigore*, but *ex comitate*, or in the language of Huber, "quatenus sine præjudicio indulgentium fieri potest," &c. Another eminent American authority, Chief Justice Parker, has recognised a similar doctrine in an elaborate Judgment, in the course of which he observes, that "the laws of a State cannot by any inherent authority be entitled to respect *extra-territorially*, or beyond the jurisdiction of the States which enact them; this is the necessary result of the Independence of distinct Sovereignties[7]."

Jus Civile of a State operative only within its territory.

§ 152. A difference of *kind* exists between the Authority which a Nation claims to bind its own natural born and naturalised subjects by its laws, in whatever country they may be, and the Right which a Nation possesses to control by its Laws all persons and property within its territory. The former authority is founded upon an implied or express Compact amongst the members of the Political Society which constitutes the Nation, and which Compact

4 Droit des Gens, B. II. § 84.

5 Martens, Précis du Droit des Gens, § 86.

6 Kent's Commentaries, Tom. II. § 457.

7 Blanchard v. Russell, 13 Massachusetts Repts. p. 4. cf. Bank of Augusta v. Earle, 13 Peter's Repts. p. 584.

has given rise to personal obligations on the part of the subject members towards the Sovereign Power; by virtue of which the Sovereign Power of a Nation may enforce its Laws against the subject members, as soon as they have returned within the limits over which its Right of Empire extends.

The latter Right is incidental to the Right of Empire; which is a Paramount Right within the limits of a Nation's territory. When, therefore, it is said that the Sovereign Power of a Nation may bind by its Laws its natural born or naturalised members everywhere, it must be understood that this attribute of *personal* Sovereignty is subordinate to the attributes of *territorial* Sovereignty; and that a Nation cannot enforce its Laws against its subjects whilst they are within the territory of another Nation. The exercise of personal Sovereignty on the part of a Nation over its own natural born and naturalised subjects, in respect of matters happening within the territory of another Nation, is not in point of Natural Right altogether clear upon any acknowledged principle; nor is the authority of a Nation to bind them whilst they are within the territory of another Nation by *personal Laws* recognised by other Nations. *Residence* is, in fact, the foundation of Jurisdiction under the Law of Nations. To be resident within the territory of a Nation is to be subject to its Jurisdiction; but Nations, from considerations of mutual Comity, do not apply the same Laws in all matters to persons who are only temporarily resident, as it applies to persons who are permanently resident within its territory. The discretion however of a Nation as to the particular Law which shall be administered in its Courts is absolute, and it may decline to allow its Courts to give any effect to Foreign

Law: on the other hand, if it allows its Courts to administer Foreign Law in disputes between foreigners, or otherwise, it adopts tacitly the Foreign Law as its own for the settlement of such disputes.

The Comity of Nations sometimes gives effect to Foreign Law.

§ 153. The Laws of a Nation can only have effect or obligation within the territory of another Nation by virtue of the express or tacit consent of the latter. A Nation may prohibit the operation of all Foreign Laws, and refuse to recognise any rights growing out of them within its territory. On the other hand, it may prohibit some Foreign Laws, and give operation to others, either absolutely, or *sub modo*. If the Statute or Common Law of the Nation speaks clearly in such matters, it must be obeyed by all within the local limits of its authority. When both are silent, European Courts of Justice under the Comity of Nations presume the tacit adoption of the Laws of a Foreign Nation by their own Government, in matters which regard Foreign Interests, unless they are repugnant to its own policy, or prejudicial to its own interests. No Nation can be justly required to give up its own fundamental policy and institutions, in favour of those of another Nation; much less can any Nation be required to sacrifice its own interests in favour of another Nation, or to enforce doctrines which in a moral or political view are incompatible with its own safety or happiness, or with its conscientious regard to justice and duty. It is therefore essentially a question of *Comity* between Nations, to what extent effect shall be given to Foreign Law, and all questions of *Comity* depend upon a variety of circumstances which cannot be reduced to any certain rule. Huberus[8] has propounded upon this question three maxims, which Mr. Justice Story, Mr.

[8] De Conflictu Legum, L. I. Tit. III. § 2.

Wheaton, and M. Fælix equally approve, as being conformable to the practice of Nations. The first is, that the Laws of every Empire have force only within the limits of its own Government, and bind all who are subjects thereof; but not beyond those limits. The second is, that all persons who are found within the limits of a Government, whether their residence is permanent or temporary, are to be deemed subjects thereof. The third is, that the rulers of every Empire from *Comity* admit that the Laws of every people in force within its own territorial limits ought to have the same force and effect everywhere, so far as they do not prejudice the power or rights of other Governments, or of their citizens. "From this," Huberus adds, "it appears that this matter is to be decided not simply by the Civil Law of a Nation, but by the reciprocal convenience and the tacit consent of different Nations; for since the laws of one people cannot have any direct operation amongst another people, so nothing could be more prejudicial to the commerce and general intercourse of Nations, than that what is legally valid in one place should become without effect by reason of the diversity of the Law in another place[9]. Certain Jurists have contended that the term *Comity* is not sufficiently expressive of the obligation of Nations to give effect to Foreign Laws, when they are not prejudicial to their own rights and interests, and have suggested that the doctrine rests on a deeper foundation; and that it is not so much a matter of Comity or Courtesy as a matter of paramount Moral Duty. "Now if it be assumed," writes Mr. Justice Story, "that such a Moral Duty exists, it is clearly

9 Bynkershoek, De Foro Legatorum, c. 2. Martens, Précis, § 84. Klüber, Droit des Gens, § 54.

one of imperfect obligation, like that of beneficence, humanity, or charity. Every Nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded; and certainly, there can be no pretence to say that any Foreign Nation has a right to require the full recognition and execution of its own Laws in other territories, if those Laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or if their Moral character is questionable, or their provisions are impolitic or unjust[10]. Even in other cases it is difficult to perceive a clear foundation in Morals, or in Natural Law, for declaring that any Nation has a right (all others being equal in Sovereignty) to insist that its own Positive Laws should be of superior obligation in a Foreign Realm to the Domestic Laws of the latter, which may be of an equally positive character. What intrinsic right has one Nation to declare that no Contract shall be binding, which is made by any of its subjects in a Foreign Country, unless they are twenty-five years of age; any more than another Nation, where the Contract is made, has a right to declare, that such Contract shall be binding, if made by any person of twenty-one years of age. One would suppose that if there be anything within the scope of National Sovereignty, it is the right of a Nation to fix what shall be the rule to govern Contracts made within its own territory[11]."

Personal, Real, and Mixed, Statutes.

§ 154. A distinction has accordingly been made by the Civilians between *Personal* Statutes, *Real* Statutes, and *Mixed* Statutes. *Personal* Statutes, ac-

[10] Story's Conflict of Laws, § 33.

[11] Saul v. his Creditors, 17 Martin's Louisiana Repts. 569—598.

cording to this classification, are those portions of the Civil Law of a Nation which have persons principally for their object, and treat only of property as an accessory; such are those which regard birth, legitimacy, freedom, the right of instituting suits, majority as to age, incapacity to contract or to make a will or to sue in proper person, &c. *Real* Statutes are those which have property principally for their object, and which do not speak of persons except in subordination to property; such as those Laws which concern the disposition which may be made of property either by deed or by will. *Mixed* Statutes are those which concern at once persons and property. This threefold classification has been considered by Merlin[12] to be unnecessary, as every Statute ought to receive its denomination according to its principal object; and according as that object is real or personal, so ought the quality of the Statute to be determined. But the distribution of Statutes into three classes is usually adopted, as stated by Rodenburg[13]; because there is a corresponding difference of fact in the scope of Statutes, for a Statute either disposes respecting persons in the abstract, without any regard to things; as, for instance, at what age a person shall be a free agent (Sui juris), and cease to be subject to the parental authority, (patria potestas,) or it disposes of things without regard to persons; as, for instance, whether property of a certain quality can pass by will, or must be transmitted by deed, and in either case, with what formalities; or it enables or forbids certain persons to do certain things, as it forbids a father to alienate

[12] Merlin, Répertoire du Droit. Art. *Statut.*

[13] De Statutorum Diversitate, c. 2. p. 4.

his patrimonial estates, and permits him to dispose of property acquired during his lifetime[14].

Growth of Private International Jurisprudence.

§ 155. With regard to *Personal* Statutes, they are held to be of general obligation and force everywhere. *Real* Statutes, on the other hand, are held to have no extra-territorial force or obligation. With regard to *Mixed* Statutes, the extent and degree of their operation is one of the most intricate questions of International Jurisprudence. Thus much however may be said, that their operation is not a question of Right, but of Comity; and that the Comity of Nations extends thus far only. If, for instance, a Mixed Statute involves a question of Contract, and it is sought to enforce the Contract within the territory of an Independent Power other than that Power within whose territory the Contract has been made, it is necessary in the first place, that the subject matter of the Contract should be such as does not contravene the Law or policy of the Power, before whose tribunals it is sought to be enforced. This fact being established as a preliminary, the tribunals of the latter Power will take into consideration the *lex loci contractûs*, to determine the *constat* of the obligation, but they do not administer the Law of the place, where the Contract was entered into, in awarding the remedy. They award only that remedy which the *Lex Fori* expressly ordains, or a remedy which is in accordance with the analogy of the *Lex Fori*.

The administration of Foreign Law by Courts of Justice under the Comity of Nations has given rise to an extensive department of Juridical Science,

[14] The distribution of Statutes into three classes is adopted by Boullenois, Traité des Statuts Réels et Personels, L. I. c. 2. obs. 2. and by Pothier, Coutumes d'Orléans, c. 1. § 1. Art. 6, 7, 8.

which has been termed Private International Jurisprudence. This branch of Juridical Science, which is concerned more especially with the conflict of Laws arising out of the relations of civil life, which exist between the citizens of different States, proceeds upon a wise and liberal regard to the mutual convenience and mutual necessities of mankind. The real difficulty is to ascertain what principles in point of public convenience ought to regulate the conduct of Nations in these matters in regard to one another. The necessity of the general welfare has sanctioned certain exceptions to the rule, *Statuta suo clauduntur territorio, nec ultra territorium disponunt;* and the *Civil* legislation of one Nation may through the Comity of another Nation have effect given to it beyond the limits of its territory. But there is no such Comity in regard to the *Criminal* legislation of a Nation, and the Criminal Law of one Nation has only effect given to it within the territory of another Nation by virtue of express Conventions.

Exceptional position of Europeans whilst resident amongst Asiatics.

§ 156. Instances of such Conventions are found in the Capitulations between the Christian Powers of Europe and the Ottoman Porte; whereby magistrates nominated by various Christian Powers are respectively empowered to administer the Law of their own Nation amongst its subjects, who may be resident within the Ottoman territory. Treaties to a similar effect have been concluded by the Emperor of China with Great Britain[15], (22 July, 1843,) with the United States of North America[16], (3 July, 1844,) with France[17], (24 Oct. 1844,) and with Russia[18], (13 June, 1858,) and by the Emperor of Japan with

[15] Martens, N. R. Gén. V. p. 434.

[16] Id. VII. p. 134.

[17] Id. VII. p. 443.

[18] Id. XVI. pt. II. p. 128.

Great Britain[19], (26 August, 1858,) and with France[20], (9 Oct. 1858.) Such treaties however are in the highest degree exceptional. But the Law of European Nations itself has always been exceptional in its application to Mahommedan and other Non-Christian Nations. Amongst Christian States there are no such fundamental differences in their respective standards of Morality, as to render the Criminal Law of one State totally inapplicable to the subjects of another State; but amongst the Mahommedan and Buddhist Nations there is so essential a diversity in the sanctions, which religion and morality attach to human conduct, as contrasted with those which prevail throughout Christendom, that from the oldest time an immiscible character between Europeans and Orientals has been maintained. Europeans are not admitted into the general body and mass of the society of Asiatic Nations[21]; they continue strangers and sojourners in the land, if they reside amongst them; they form *de facto* an *extra-territorial community*, which does not acquire a National character by permanent residence amongst them. In former times when it was the custom of the Christian Powers of Europe to establish Factories in the cities of the Levant, Europeans permanently trading under the shelter and protection of those establishments were held to take the National character of the Association, under which they lived and carried on their commerce. The modern system of exercising treaty-jurisdiction leads to the presumption, that the subjects of the Powers which are parties to those treaties, being exempt from the territorial Sovereignty of the

[19] Martens, N. R. Gén. XVI. pt. II. p. 430.

[20] Ibid. p. 439.

[21] The Indian Chief, 5 Robinson's Rep., p. 29.

State wherein they permanently reside, will retain, notwithstanding such residence, the National character which attaches to them by their origin.

Personal Actions of Foreigners.

§ 157. In Great Britain, in the United States of North America, in the Germanic States, in Holland, foreigners equally with natives are allowed to bring personal actions against foreigners before the tribunals of the country, where they may happen to reside. They cannot bring real or possessory actions, as those are within the exclusive competency of the Courts of the *loci rei sitæ*. But inasmuch as by the Law of Nations the jurisdiction of a Nation extends over all *persons and property* within its territory, with the exception of the persons and property of Sovereign Princes and their Representatives, it would seem clear upon general principles, that it is a matter of civil policy to decide, in what manner that jurisdiction should be exercised as between foreigners. In some countries, such as Spain and Portugal, there have been special tribunals constituted under treaty-engagements and charged with the jurisdiction over questions in which foreigners are concerned. The Judges of these tribunals are termed Judges-Conservators. In Portugal there was a remarkable privilege enjoyed by British subjects. The Treaty of 1654 concluded between the Republic of England and the Kingdom of Portugal provided for the appointment of a Judge-Conservator of the British Nation, whose province it was to decide all actions between British Subjects not having a Portuguese Domicil by the Law of Nations, and all actions between British and Portuguese subjects. There was an analogous Treaty of a later date between France and Portugal in regard to French Subjects. But in case of a suit of a French Subject against a British Subject,

the privilege granted to the British Nation being the most ancient, the Judge-Conservator of the British Nation was held to be the Competent Judge.[22] The institution of a special judge to administer justice between resident foreigners not domiciled in Rome, and between resident foreigners and Roman Citizens, was a peculiar feature of the early Roman Jurisprudence. The functions of the *Prætor Peregrinus* are described as being those of a Judge *qui inter cives et peregrinos jus dicebat*, and the rules of law which he administered were classed by the Roman Jurists under the head of *Jus Gentium*, or the law which Natural Reason teaches all mankind, and which is observed equally by all Nations, and under which all kinds of personal contracts are comprised.[23] France occupies a somewhat exceptional position as contrasted with the States above mentioned. Two foreigners who have entered into a contract in a foreign country are not allowed to sue each other upon the contract before a French Tribunal, unless one or other of the foreigners has acquired a French domicil before the contract was entered into.[24] The same rule prevails in Belgium and in the Kingdom of the Two Sicilies, where the Code Napoleon has been introduced. The principle of jurisprudence, upon which this practice is based, is comprised in the maxim, *Actor sequitur forum Rei*, according to which every defendant is entitled to be sued before his natural judges. The Code Napoleon interprets this maxim in such a case as referring to the

[22] Gazette des Tribunaux of 16 and 17 Oct. 1843, cited by Fœlix, Traité du Droit International, T. I. § 148.

[23] Ex hoc jure gentium et omnes pœne contractus introducti sunt, ut emptio, venditio, locatio, conductio, societas, depositum, mutuum, et alii innumerabiles. Just. Inst. L. I. Tit. II. § 2.

[24] Code de Commerce, Art. 631.

Tribunals of the *domicil* of the Defendant. Vattel[25] applies this maxim in a different manner; he holds that, "disputes that may arise between foreigners or between a foreigner and a citizen are to be determined by the Judge of *the place*, and according to the laws of *the place*. And as the dispute properly arises from the refusal of the defendant, who maintains that he is not bound to perform what is required of him, it follows from the same principle, that every defendant ought to be prosecuted before his own Judge, who alone has a right to condemn him and compel him to the performance. The Swiss have wisely made this rule one of the articles of their alliance, in order to prevent the quarrels that might arise from the abuses that were formerly too frequent in relation to this subject. *The defendant's Judge* is the judge of *the place* where the defendant has his domicil, or the Judge of *the place* where the defendant happens to be when any sudden difficulty arises, provided it does not relate to an estate in land, or to a right annexed to such an estate. In this latter case as property of that kind is to be held according to the laws of the country where it is situated, and as the right of granting possession belongs to the ruler of that country, differences relating to such property cannot be decided anywhere except in the State on which it depends." M. Fœlix, in commenting on the practice of the French Tribunals, considers that the refusal of the French Tribunals to take cognisance of personal actions, in which both the Plaintiff and Defendant are foreigners temporarily resident in France, is a violation of the Law of Nations as received in Europe, and exposes French Subjects to a reciprocal disability before the tribunals of another country, wherein they may be

[25] Droit des Gens, L. II. § 103.

temporarily resident, seeing that the condition of reciprocity is presumed, whenever the Comity of Nations is invoked.

Extra-Territoriality of certain Foreign Persons and Things.

§ 158. The privilege of *Extra-Territoriality*, or immunity from the Civil Law of the Territory, is by the practice of Nations accorded to all Sovereign Princes and their attendants, who may be temporarily within the territory of an Independent Power. The same privilege is accorded to the Representatives of Foreign Sovereigns, who may be permanently resident under the title of Ambassadors or Envoys at the Court of an Independent Power. By the established practice of Nations the House of Residence of an Ambassador or Envoy is held to be subject to the civil and criminal jurisdiction of the Sovereign whom he represents, to the exclusion of the jurisdiction of the Sovereign to whom he is accredited, and within whose territory he resides. All persons attached to the person of the Ambassador and all his moveable effects partake in this immunity. In a similar manner, if an Independent Power permit the armed forces of another Nation to pass through its territory, this permission implies a waiver on its part of all jurisdiction over the troops during their passage through its territory, and a license to the commander to maintain that discipline, and to inflict those punishments, which the government of his troops may require. On the other hand, if an armed force should enter by land the territory of an Independent Power without its permission, such Power is entitled to exercise its absolute territorial jurisdiction over them, and if it thinks fit, to disarm them. The rule, however, which applies in relation to an armed force upon land, does not apply equally to an armed force upon the sea, as by the usage of Nations ships of war may freely enter the ports of a friendly Power without express permission, unless there be an especial prohibition

against vessels of war entering such ports. It is competent for every Nation for reasons of State Policy to close all its ports, or certain only of its ports, against the vessels of war of all Nations or against the vessels of war of a particular Nation, but in such cases notice is usually given of such determination. If there be no such prohibition, the ports of a Friendly Nation are considered to be open to the public ships of all Powers, with which it is at peace, for purposes of hospitality, and they are supposed to enter such ports under an implied license from the Sovereign Power of the place. This implied licence in the case of a public ship is by practice construed to carry with it a total exemption from the law of the territory. A public vessel of war represents the Sovereign Power of the Nation, under whose commission and flag it sails. If it leaves the High Seas, the common highway of Nations, and enters within the maritime territory of a Friendly State, it is entitled to the same privileges which would be extended to the person of the Sovereign.[26] A ship of war has been termed an extension of the territory of the Nation to which it belongs, not only when it is on the wide ocean, but when it is in a foreign port. In this respect a ship of war resembles an army marching by consent through a neutral territory. Neither ships of war nor army so licensed fall under the jurisdiction of a Foreign State.[27]

Merchant Vessels are subject to the Territorial Law.

§ 159. Private vessels, on the other hand, enter the ports of a foreign Nation for the purposes of trade, under the implied protection of the Sovereign of the place, but subject at the same time to the Law of the

[26] Lord Chief-Justice Marshall's Judgment in The Schooner Exchange v. McFaddon, 7 Cranch's American Repts. p. 116.

[27] Dr. Channing on the Duty of Free States.

Territory. So complete is the authority of the *lex loci* over all persons and property on board of private vessels, that if a vessel under the British Mercantile Flag were to enter the port of Charleston, having free negro sailors amongst her crew, the mercantile flag will not protect those sailors from the operation of the territorial Law of the state of South Carolina, which forbids a free negro to be at large within the limits of that State. It has thus frequently happened that negroes, or persons of colour, though free subjects of her Britannic Majesty, and duly entered on the muster roll of the Crew of a British merchant vessel, have, on such vessel entering the port of Charleston, been taken out of her by the officers of the Port under the authority of the local law, and have been detained in custody until the vessel has cleared outwards, when they have been again placed on board of the ship with permission to leave the country. On the other hand, if a merchant ship under the flag of the United States, or under the Palmetto flag of South Carolina, were to enter a British Port with one or more negro slaves on board, her mercantile flag would not avail to exclude the jurisdiction of the British Courts, if their territorial authority should be invoked to vindicate the personal liberty of an human being who is within British Territory[28]. It follows, that the crew of a merchant vessel, which is within the port of a foreign Nation, are amenable to the territorial Law of that Nation in respect of all offences committed within the port, whether those offences be committed on board the merchant vessel or on shore. But if an offence be

[28] It was decided in the memorable case of Somerset the Black, by a Judgment of the Court of King's Bench, June 22, 1772, that a State of Slavery cannot exist in Great Britain.

committed on board a merchant vessel whilst she is on the High Seas, such an offence is only cognisable by the courts of the country to which she belongs; no one on board of her may be impleaded for such offence before the courts of a foreign country, although the vessel may enter its ports immediately after the offence has been committed. The crime of piracy, of course, is an exception to this rule, being an offence under the Law of Nations, which may be punished even on the High Seas by the first comer, and which crime every sovereign Power has a concurrent jurisdiction to suppress.

Right of Emigration.

§ 160. Considered from an international point of view, the jurisdiction of a Nation must be founded either upon the person or the property being within its territory. Considered from a civil point of view, jurisdiction may be founded upon *natural* as well as *local* allegiance; in other words every independent State claims to make laws perpetually binding upon its natural born subjects wherever they may be. But natural allegiance, or the obligation of perpetual obedience to the government of the country, wherein a man may happen to have been born, which he cannot forfeit, or cancel, or vary by any change of time, or place, or circumstance, is the creature of Civil Law, and finds no countenance in the Law of Nations, as it is in direct conflict with the incontestable rule of that Law; "Extra territorium jus dicenti impune non paretur[29]."

Vattel, accordingly, holds that a citizen has an absolute right to renounce his country and abandon it entirely—a right founded on reasons derived from the very nature of political society. For instance, if the citizen cannot procure sustenance in his own country,

[29] Dig. L. II. Tit. 1. § 20. Pothier, Pandect. L. I. T. 1. n. 7.

it is undoubtedly lawful for him to seek it elsewhere. If the society of which he is a member fails to discharge its obligations towards a citizen, he may withdraw himself. If the major part of a Nation, or the Sovereign who represents it, attempts to enact laws relative to matters in which the Social Compact cannot oblige every citizen to submission, as for instance in the affairs of Religion, those who are averse to such laws have a right to quit the Society and settle themselves elsewhere. Citizens, who under such circumstances abandon their native country *sine animo revertendi*, and settle themselves elsewhere, are called *Emigrants*, and the Law of Nations recognises in such persons a capacity to acquire the National character of the country of their adoption.

Domicil, the criterion of National character.

§ 161. According to the Law of Nations, when the National character of a person is to be ascertained, the first question is, in what territory does he reside, and is he resident in that territory for temporary purposes, or permanently. If he resides in a given territory permanently, he is regarded as adhering to the Nation to which the territory belongs, and to be a member of the political body settled therein. If he is only resident in a given territory for temporary purposes, he is regarded as a stranger thereto, and a further question must then be asked, in what country is his principal establishment, and where, when he has returned, does he consider himself to be at home[30]. The country, which satisfies the conditions implied in this further question, is designated in the language of

[30] In eo loco singulos habere domicilium non ambigitur, ubi quis larem, rerumque et fortunarum suarum summam constituit, unde non sit discessurus si nihil avocet; unde cum profectus est, peregrinari videtur, quo si rediit, peregrinari jam destitit.—Codex, L. X. Tit. XXXIX. § 7.

public Law the *Domicil* of the individual, which Vattel[31] defines as a fixed residence in any place with the intention of always remaining there. Wolff has, in a similar manner, defined *domicilium* to be "habitatio aliquo in loco constituta, perpetuo ibidem manendi animo[32]." The word *Domicil* is originally a term of Roman Municipal Law, the Romans using the expression to denote the place in which a Roman citizen had to discharge his municipal obligations, in distinction from the place in which he was born; and in this sense it is employed by Grotius[33], as illustrating the privilege which Roman citizens enjoyed under the later Imperial Constitutions, of transferring their permanent abode from one *Municipium* to another. The distinction between the *civis* and the *incola* was founded thereupon. "Cives quidem origo, manumissio, allectio, vel adoptio, incolas vero domicilium facit[34]," and jurisdiction was made in many cases to depend upon the place of residence of the individual, as distinguished from the place of his birth. The question of Domicil lost its importance after the conquest of the Roman Empire by the Barbarians, as for a long time a system of *personal* laws prevailed amongst the communities of mixed races, the Lombard living under the Lombardic, and the Roman under the Roman Law[35]; but after the Peace of Westphalia, from which event we may date the commencement of *normal intercourse* between European Nations[36], the subject of Domicil came to

31 Droit des Gens, L. I. § 217.
32 Jus Gentium, § 137.
33 De Jure Belli et Pacis, L. II. c. V. § 24.
34 Codex, L. X. Tit. 29. § 7.
35 Savigny, Geschichte des Römischen Rechts in Mittelalter, c. III. § 30.—Story's Conflict of Laws, § 2.
36 The establishment of permanent Embassies at Foreign Courts dates from this period.

be again discussed by Jurists under new circumstances, namely, with reference to the residence of individuals in different Territories, and not as in the Roman system of Law, with reference to their residence in different places within the same Territory, namely, the Roman Empire. Dr. Phillimore, in his Treatise on Domicil[37], has observed that "as the subjects of one kingdom began to migrate into and reside in other countries, the various questions, arising from a conflict between the municipal regulations of the original and the adopted country, gave importance to the Law of Domicil, and rendered the maintaining an uniformity of rules respecting it in Christendom a matter of great consequence. Lord Campbell, to the same effect, in a recent judgment of the House of Lords, overruling the Scotch Courts of Exchequer, has taken occasion to remark, that "the doctrine of Domicil has sprung up in Great Britain very recently, and that neither the Legislature nor the Judges thought much of it, but it is a very convenient doctrine, it is now well understood, and it solves the difficulty with which this case was surrounded[38]." Dr. Phillimore has further remarked most aptly, that the circumstance which has most contributed to give importance to the Law of Domicil, has been the universally increasing value of *personal property*.

Jurisdiction and Remedies.

§ 162. Jurists have laid it down that there are, properly speaking, three places of jurisdiction; first, the domicil of the defendant, commonly called *forum domicilii*: "Nam ubi domicilium reus habet, vel tempore contractûs habuit, licet hoc postea transtulerit, ibi tantum eum conveniri oportet[39];" secondly, the

37 The Law of Domicil, § 8.

38 Thompson v. Advocate General, 12 Clark and Finelly's (House of Lords) Reports, p. 1.

39 Codex, Lib. III. Tit. XIII. § 2.

place where the thing in controversy is situated, commonly called *forum rei sitæ:* "Sed et in locis, in quibus res, propter quas contenditur, constitutæ sunt, jubemus in rem actionem adversus possidentem moveri[40];" and thirdly, the place where the contract is made or other acts done, commonly called *forum rei gestæ* or *forum contractûs*[41]: "Illud secundum est, eum, qui ita fuit obligatus, ut in Italia solveret, si in provincia habuit domicilium, utrobique posse conveniri, et hic et ibi[42]." These distinctions constitute the basis of the reasoning of most Jurists in discussing the competency of tribunals to hold jurisdiction of causes and the proper operation of Judgments and Decrees (rei judicatæ); as for instance, whether they are final and preclude any further proceeding on the same cause of action before the Tribunals of another country. Some countries, such as France, repudiate all obligation on the part of their Tribunals to administer the law of the *forum contractûs.* Other countries, such as Great Britain and the United States of America, administer the law of the *forum contractûs* in this manner: "What the nature of the obligation is must be determined by the laws of the country where it was entered into, and then this country will apply its own law to enforce it[43]." "We all agree that in construing contracts we must be governed by the laws of the country where they are made, for all contracts have reference to such laws. But when we come to remedies, it is another thing. They must be pursued by the means which the law points out, where the parties reside. The laws of the

[40] Codex, Lib. III. Tit. XIX. § 3.

[41] Huberus, Lib. V. Tit. I. Boullenois, Obs § 25.

[42] Dig. L. V. Tit. I. s. 19. § 4.

[43] Lord Chief Justice Eyre in Melan v. Fitzjames, 1 Bos. and Puller, 138.

country where the contract was made can only have reference to the nature of the contract; not to the mode of enforcing it. Whoever comes voluntarily into a country subjects himself to the laws of that country, and therein to all remedies directed by those laws on his particular engagements[44]." It is immaterial whether the remedies given by the law of a foreign country, to the tribunals of which country the complaint is made, exceed or fall short of those given by the law of the place of contract; in either case the parties to a suit must accept the remedy of the Forum, to which they have appealed. Lord Tenterden in a more recent case has said, "A person suing in this country must take the law as he finds it. He cannot by virtue of any regulation in his own country enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this country are entitled to[45]." A similar doctrine has been solemnly promulgated in the House of Lords on a still more recent occasion[46].

Comity of Nations in regard to personal property.

§ 163. The rightful exercise of jurisdiction on the part of a Nation depends upon one or other of these conditions, that the person or the property is within the territory of the Nation. In either of these cases a Nation is capable of enforcing the judgment of its tribunals *in invitos*. If the persons are within its territory, the Sovereign Power of the Nation can compel them to appear before its tribunals, and can enforce its decisions *in personam*. If the property is within its territory, the Sovereign Power of the

44 Mr. Justice Heath in Ogden v. Saunders, 12 Wheaton, p. 213.

45 De la Vega v. Viana, 1 Barn. and Adolph. 284

46 Don. v. Lipmann, 5 Clark and Finelly, 1, 13, 14.

Nation has control over it, and can enforce its judgments *in rem*. But the exercise of the strict Right of Nations has been tempered by the Comity of Nations with respect to *persons*, and with respect to *personal* as distinguished from *real* property, and in practice the Civil Law of a Nation has exclusive operation given to it only with respect to persons domiciled within its territory, and with respect to real property which is there situate. The maxim *mobilia sequuntur personam* is interpreted to signify that moveables are, in law, attached to the person of the owner, although they may in fact be apart from it. The incidents of Moveable property are accordingly regulated by the same law as the person of the owner, that is by the law of his Domicil. "Les meubles," says Cochin, "quelque sorte qu'ils soient, suivent le Domicile[47]." Personal property having no *Situs* of its own, follows the domicil of its owner[48]. Mr. Justice Story, in his Conflict of Laws, has discussed at great length the reasoning of various Jurists as to the grounds upon which this doctrine proceeds, but their arguments all lead to the same result, and whatever may have been the true origin of the doctrine, it has now received so general a sanction amongst civilised nations, that it may be treated as part of the Jus Gentium. The grounds upon which the English Tribunals have received the doctrine are stated by Lord Loughborough: "It is," he says, "a clear proposition not only of the Law of England, but of every country in the world, where Law has the semblance of a Science, that personal property has no locality. The meaning of this is, not that personal

47 Cochin, Œuvres, Tom. V. p. 85.

48 Thomson v. The Advocate General, 12 Clark and Finelly, (House of Lords) Repts. p. 1.

property has no visible locality, but that it is subject to that law which governs the person of its owner, both with respect to the disposition of it, and with respect to the transmission of it, either by succession or by the act of the party. It follows the law of the person[49]." Lord Chief Justice Abbot has observed on a more recent occasion, that "personal property has no locality, and even with respect to that, it is not correct to say that the Law of England gives way to the law of the foreign country, but that it is part of the Law of England that personal property should be distributed according to the Jus Domicilii[50]."

Domicil of Origin and Domicil of Choice.

§ 164. The Domicil of a person for international purposes may be either his Domicil of origin, or his Domicil of choice. The Domicil of origin of a person is identical with the Domicil of his father at the time of his birth. "Patris originem unusquisque sequatur[51]." If his parents at the time of his birth should be on a temporary visit to a foreign country, the home of the parents, and not the country of his birth, is the Domicil of origin of the child[52]. The Domicil of origin is thus not necessarily identical with the place of birth. The place of birth on the other hand may constitute a person a natural born subject of one Sovereign for municipal purposes, whilst he is a domiciled subject of another sovereign for international purposes. The Domicil of origin cannot be divested during minority by a change of residence on the part of the minor with the intention of making his new residence his home, but it may be divested by the act of his father. If the father changes his

49 Still v. Worswick, 1 Henry, Blackstone's Repts. 690.

50 Doe d. Birthwhistle v. Vardill, 5 Barn. and Cresswell, 438, 451, S. C. 2 Clark and Fin. 571.

51 Codex, Lib. X. Tit. XXXI. § 36.

52 Wolffii Jus Gentium, § 138.

residence and acquires a new Domicil, it becomes the Domicil of his minor children, and if the father dies leaving minor children surviving him, the father's Domicil of choice at the time of his death is the necessary Domicil of his children until they come of age, and are capable of acquiring a Domicil of choice. Every person of full age is capable of selecting a Domicil; and if such a person removes from the country, where his father had his Domicil, to a foreign country with the settled purpose of making it his permanent residence, the country of his adoption becomes his domicil of choice. Domicil being thus under the Law of Nations the foundation of jurisdiction over persons, it is intelligible on general principles that the residence of Ambassadors and Political Envoys in a foreign country, even if such residence continue up to the time of their death, being a residence "sine animo manendi," should not operate to change their Domicil, such as it was at the time when they became resident in the foreign country; their extra-territoriality besides secures to them an "immiscibility" of national character. A different rule however prevails with respect to Consuls or Commercial Agents, who, if permanently engaged in commerce themselves, may acquire a Domicil in the country where they reside. It is sometimes a question of great intricacy to determine in what place a person has his true Domicil. No person according to the Law of Nations is without a Domicil. In the absence of all evidence of any other Domicil *de facto*, the Domicil of Origin is the Domicil *de jure*[53], but a per-

53 Quoniam tamen domicilium naturale tamdiu quis retinere censetur, quamdiu propria voluntate sibi nullum constituit, vagabundi quoque domicilium naturale vulgo retinere censentur. Wolff. Jus Gentium, § 139.

son may have more than one Domicil for commercial purposes; as for instance, a person may be a partner in a great commercial establishment in New York, and in another equally great commercial establishment in Liverpool[54]; and in respect of contracts he may be subject to two different jurisdictions according as the contract is entered into by the New York establishment, or by the Liverpool establishment; but no person can have more than one testamentary Domicil, as the latter is identical with the place of the party's principal establishment. To enter more minutely into the *criteria* of Domicil would be foreign from the purpose of the present treatise, which is concerned with Domicil only so far as the principle of Domicil influences the Jurisprudence of Nations, in reference to persons and personal property. Mr. Justice Story's excellent work on the Conflict of Laws and M. Fœlix's treatise on Private International Law may be consulted with advantage by those, who desire to become more accurately acquainted with the details of this branch of the Law of Nations.

54 Labeo judicat eum, qui pluribus locis ex æquo negotietur, nusquam domicilium habere; quosdam autem dicere refert, pluribus locis eum incolam esse, aut domicilium habere; quod verius est. Dig. L. Tit I. § 5. The San José Indiano and Cargo, 2 Gallison's American Reports, p. 287. The Portland, 3 Robinson, p. 41. The Jonge Classina, 5 Robinson, p. 502.

CHAPTER X.

RIGHT OF THE SEA.

The use of the open Sea common to all mankind—A Common Law of the Sea—Affinity to the Roman Law in certain matters—Origin of the Admiralty Jurisdiction—Its connection with that of the Consules Maris—Piracy justiciable everywhere—Concurrency of Admiralty with National Jurisdiction—National Jurisdiction over the open Sea—Maritime Jurisdiction of a Nation—Territorial Seas distinguished from Jurisdictional Waters—Prescriptive Right over portions of the Sea—Right of Fishery on the High Seas—Neutrality of Jurisdictional Waters—Right of Maritime Toll in respect of Lighthouses and Sea-Marks—Prescriptive Right of Sea-Toll—The Sound Dues—The Straits between the Mediterranean and the Black Sea—The Comity of Nations in matters of Revenue and Quarantine—Right of Fishery in Jurisdictional Waters—Ceremonial of the High Seas—Ceremonial within Jurisdictional Waters.

The use of the open Sea common to all mankind.

§ 165. THE Ocean or open Sea is by Nature not capable of being reduced into the Possession of a Nation, since no permanent settlement can be formed upon its ever changing surface; neither is it capable of being brought under the Empire of a Nation, as no armed fleet can effectively occupy it in its full extent, so as to preclude other Nations altogether from the use of it. Nature herself has in these respects set limits to human enterprise and human ambition. But independently of these insurmountable difficulties, the use of the open Sea, which consists in navigation, is innocent and inexhaustible; he who navigates upon it does no harm to any one, and the Sea in this respect is sufficient for all mankind. But Nature does not give to man *a right to appropriate* to himself things which may be innocently used by all, and which are inexhaustible and sufficient for all. For since those things, whilst common to all, are suf-

ficient to supply the wants of each, whoever should attempt to render himself sole proprietor of them, (to the exclusion of all other participants,) would unreasonably wrest the bounteous gifts of nature from the parties excluded. Further, if the free and common use of a thing, which is incapable of being appropriated, were likely to be prejudicial or dangerous to a Nation, the care of its own safety would authorise it to reduce that thing *under its exclusive Empire*, if possible, in order to restrict the use of it on the part of others by such precautions, as prudence might dictate. But this is not the case with the open Sea, upon which all persons may navigate without the least prejudice to any Nation whatever, and without exposing any Nation thereby to danger. It would thus seem that there is no Natural warrant for any Nation to seek to take possession of the open Sea, or even to restrict the use of it by other Nations[1].

A Common Law of the Sea.

§ 166. The open Sea is, strictly speaking, *nullius territorium*. No Nation can claim to exercise jurisdiction over its waters on any ground of exclusive Possession. On the other hand, it is the public highway of Nations, upon which the vessels of all Nations meet on terms of equality, each vessel carrying with it the laws of its own Nation for the government of those on board of it in their mutual relations with one another, but all subject to a Common Law of Nations in matters of mutual relation between the vessels themselves and their crews. The origin of this Common Law of the Sea is lost in the darkness of a very remote antiquity, but it sprang into existence with the earliest necessities of maritime commerce. We find the rudiments of such a law amongst

[1] Vattel, Lib. I. c. 23. § 279. Grotius, Lib. I. c. 2. § 3. Wolffii Jus Gentium, § 127. Klüber, § 132.

the Athenians; and the Rhodian Laws of the Sea, of which a very few fragments have been preserved in the Digest[2], are supposed to have been a collection of Maritime Customs observed amongst the Nations established on the shores of the Mediterranean[3], and which formed at such time their Common Law on Maritime matters. Rules of Law which prevailed amongst those Nations are still recognised by the Maritime tribunals of existing European Nations, as rules for the decision of analogous questions.

Affinity to the Roman Law in certain matters.

§ 167. It would appear, that the Romans under the Empire with their usual wisdom recognised the Customs of the Sea, as furnishing the rule of decision in Maritime questions, where such Customs were not contrary to any positive Law of the Empire. Thus when Eudæmon of Nicomedia appealed to the Emperor Antonine against the rapacity of the Publicans in the islands of the Cyclades, on the occasion of his having suffered shipwreck, the Emperor is represented to have replied[4], "Ego quidem mundi dominus, Lex autem maris. Lege id Rhodia, quæ de rebus nauticis præscripta est, judicetur, quatenus nulli nostrarum legum adversatur. Hoc idem Divus Augustus judicavit." Bynkershoek[5], in discussing this passage of the Digest, has not approved the usual punctuation, nor admitted the received interpretation of the text, and has suggested that the words of the Emperor Antonine point only to a privilege which the Rhodians themselves enjoyed of living under their own laws, as long as they were not inconsistent with the Positive Law of the Empire. It is not very material for our present purpose to determine, which is the

2 Dig. L. XIV. Tit. II.

3 Peckii Comment. ad legem Rhodiam de jactu.

4 Dig. L. XIV. Tit. II. § 9.

5 De lege Rhodia, c. 7.

more correct construction of the passage in the Digest. On a careful examination of the legislation of the Roman Emperors, so little will be found of positive enactment in Maritime matters, that we are led irresistibly to the conclusion, that there must have been a Consuetudinary Law, according to which questions of Maritime Contract and Tort were settled; and the probability is, that the principles involved in that Consuetudinary Law were in harmony with principles, that were admitted in the Civil Law of Rome. At all events we find in portions of the Consuetudinary Law of the Sea, as it has come down to us in various collections of Sea-Customs, e. g. [6]the Rooles or Jugemens d'Oleron, the Consolato del Mare, and the Maritime Law (Wâter-Recht) of Wisby, many features of resemblance to provisions which exist in the Civil Law of Rome, not indeed *in pari materiâ*, but on subjects of which the analogy is complete. It is possible that these Rules of the Sea may be actual traditions of the Civil Law itself, which, recommended by its natural equity, may have infiltered itself imperceptibly into Maritime causes. Whatever may be the true explanation of this resemblance, these Customs of the Sea have been received by all Nations, and all Nations exercise a concurrent jurisdiction to enforce them, and for this purpose there are special tribunals established in every country, known as Courts of Admiralty Jurisdiction.

Origin of the Admiralty Jurisdiction.

§ 168. The origin of the term *Admiral* or *Amiral* is not agreed upon amongst learned men. Some have inclined to derive it from the Saxon *aen mere eal*,[7] that is, over all the sea, others from the Asiatic *Amir*,

[6] Pardessus, Collection de Lois Maritimes antérieures au XVIII Siècle. Paris, 1834.

[7] Godolphin, a View of the Admiralty Jurisdiction, anno 1661, p. 3.

or *Emir*, signifying Præfect. It seems more probable that the term came first into use amongst the Maritime Nations of Southern Europe, and that it was derived from an Oriental Source. Sir H. Spelman is of opinion, that this high Officer was not known in England by that name or style before the beginning of the reign of King Edward I, about the year 1272, although the office of *Capitaneus maris* existed before that time. The earliest Admiral of all France seems to have been *Enguarantus Dominus de Causy* in the reign of Philip the Bold, about 1280[8]. The collection of Castilian Laws, known as *Las Siette Partidas*, and the origin of which is referred to a date as far remote as 1258 or 1266, contains a full definition of the Office of Admiral. "On appelle Amiral, le chef de tous ceux qui compose l'équipage des navires armés en guerre, et il a sur la flotte qui est comme le corps d'armée principal, ou sur une escadre qui sera détachée, le même pouvoir que le roi lui-même, s'il était en personne[9]." Such seems to have been a brief summary of the functions of the Admiral of the King of Castile and Leon. On the other hand, it would appear from a collection of Maritime Laws of Catalonia and Aragon of the Fourteenth Century[10] that the word "Amiral" in its simplest sea-meaning was used to denote the chief of any Maritime expedition, even if the expedition consisted of a single ship. It is not improbable that an extraordinary increase of piracy in the latter part of the Thirteenth Century led to a more careful administration of the Laws of the Sea in England, in France, and in Denmark, after the example perhaps of Castile, and that the jurisdiction and

8 Godolphin on the Admiralty Jurisdiction, p. 21.

9 Part II. Lib. IV. Tit. 34. Lex 3.

10 Pardessus, Lois Maritimes, Tom. V. p. 404.

cognisance of all matters whatever happening upon the Sea, by reason whereof there should be cause of suit either between subjects and strangers or between strangers only, was with that object vested exclusively in a High Admiral with the full powers of the Lieutenant of the King.

Its Connection with that of the Consules Maris.

§ 169. Whatever may have been the origin of the institution of Courts of Admiralty, the forms of their proceedings were undoubtedly borrowed from the Civil Law of Rome, and the rules by which they were governed were, as is everywhere avowed, the ancient Laws, Customs, and Usages of the Seas. There can scarcely be a doubt that the Admiralty Courts of England and the Maritime Courts of all the other Powers of Europe have been formed upon one and the same common model, and that their jurisdiction, if not restricted by the territorial law, included all those subjects of which the Consular Courts (*Consules Maris*)[10] in the cities of the Mediterranean had cognisance, and with which subjects the Municipal judges in those cities were forbidden to intermeddle. These Courts are described in the *Consolato del Mare* as having jurisdiction of all controversies respecting freights; of damages to goods shipped; of the wages of mariners; of the partition of ships by public sale; of jettison; of commissions or bailments to masters and mariners; of debts contracted by the master for the use and necessities of his ship; of agreements made by the master with merchants, or by merchants with the master; of goods found on the high sea or on shore; of the armament or equipment of ships, galleys, or other vessels, and generally of all other contracts declared in the customs of the sea[11]. It is not within the scope

[10] De Lovio v. Boit. 2 Gallison's Reports, p. 400.

[11] Consolato del Mare, ch. 22. Godolphin, Adm. Jur. p. 45.

of the present work to enter further into the details of the Admiralty Jurisdiction. But it may be observed that there is a Maritime Law of Nations in time of war as well as in time of peace. The Admiralty Court exercises a *voluntary jurisdiction* in time of Peace *ad instantiam partis*, and is in such matters termed an Instance Court, whilst in time of War it exercises a *compulsory jurisdiction* over all the commissioned vessels of the Crown, which are required to bring their captures before it, in order that the Admiral or his Lieutenant may determine whether such captures are good prize of war or not. The Admiralty Court is for such purposes termed a Court of Prize, and its functions are not merely to administer the Law of Nations as between the belligerents, but the Law of Nations as between the belligerents and neutrals.

Piracy justiciable everywhere.

§ 170. The High Seas are said in a certain sense to be *nullius territorium*, as not being subject to the exclusive Possession or Empire of any Nation. In another sense they may be called the *common highway* of Nations, and perhaps this is the more correct expression, seeing that all who navigate them are subject to a Common Law of Nations, and, in matters within the scope of that Law, are amenable to the maritime tribunals of all Nations. The maintenance of the peace of the Sea is one of the objects of that Common Law, and all offences against the peace of the Sea are offences against the Law of Nations, and of which all Nations may take cognisance. The robber equally with the murderer on the High Seas is technically a sea-felon or pirate, and every hand may be lawfully raised against him; he is, in fact, regarded as an enemy of the human race (hostis humani generis). The Pirate has no National character, and to

whatever country he may have originally belonged, he is *justiciable* everywhere, being reputed out of the protection of all laws and privileges whatever[12].

Concurrency of Admiralty with National Jurisdiction.

§ 171. There are however portions of the sea, upon which if offences be committed, they are not merely regarded as offences against the Peace of the Sea, but offences against the Peace of a Nation. Thus although the jurisdiction of the Admiralty travels everywhere with the flow of the tide, yet when the Sea approaches the territory of a Nation or passes within the headlands of its coast, an offence committed upon tidal waters may become an offence not merely against the Peace of the Sea, but against the Peace of the Nation, and accordingly will be cognisable by the Civil Courts of the Nation as well as by the Admiralty Court. By practice, indeed, the Admiralty Jurisdiction over tidal rivers is restricted to such portions of them as are below the first bridges[13] (*infra primos pontes*) seawards. Above the first bridges, which are effective impediments to free passage to or from the sea, the Civil Law of the Nation is of exclusive force: below that point, until we reach the *High Seas*, the Civil Law of the Nation operates concurrently with the Maritime Law of Nations.

National jurisdiction over the open sea.

§ 172. It becomes necessary therefore to inquire what portion of the open sea is by the practice of Nations, held to be within the operation of the Territorial Law of a Nation. "It is of considerable importance," writes Vattel[14], "to the safety and welfare of States, that a general liberty be not allowed to all comers to approach so near their possessions, especially with ships of war, as to hinder the approach of

[12] Life of Sir Leoline Jenkins, Tom. II. p. 714.

[13] Spelman's Reliquiæ. Godolphin, Adm. Jurisd. p. 134. cf. 15. Rich. II. c. 3.

[14] Droit des Gens, L. I. § 288.

trading Nations, and molest their navigation." Upon this principle a Neutral Nation is held to be entitled to preclude Belligerent Powers from carrying on mutual hostilities upon the open sea within a certain distance of its coast. That distance, as between Nation and Nation, is held to extend as far as the safety of a Nation renders it necessary, and its power is adequate to assert it; and as that distance cannot, with convenience to other Nations, be a variable distance, depending on the presence or absence of an armed fleet, it is by practice since the introduction of firearms identified with that distance, over which a Nation can command obedience to its Empire by the fire of its cannon[14]. That distance, by consent, is now taken to be a Maritime League seawards along all the coasts of a Nation. Beyond the distance of a sea-league from its coasts, the Territorial Laws of a Nation are, strictly speaking, not operative. It may happen that a Nation chooses to extend its own Laws over its National vessels wherever they may be navigated on the High Seas, but however general and comprehensive the phrases used in the Municipal Law may be, they must be always restricted in their construction to the citizens of the State to which the vessel belongs[15], and to the mutual relations between such citizens, and cannot be extended to the vessels of other Nations, or to the persons on board of them.

Maritime jurisdiction of a Nation.

§ 173. Writers on Public[16] Law have spoken of the open sea (mare vastum) within the distance of a Maritime League along the coasts of a Nation as its *Maritime Territory* (See-Gebiet). If the Law of Nations be held to be a portion of the Law of each Nation

[14] Bynkershoek, L. II. c. 3. § 13.

[15] The Apollo, 9 Wheaton's Reports, § 370.

[16] Klüber, § 130. Wheaton's Elements, pt. 4. c. 4. § 6.

in such matters as are within its scope, then there may be no valid objection to the use of the phrase *Maritime Territory* in the sense of Territory subject to the Law of the Sea, but inasmuch as the term *territory* in its proper sense is used to denote a district within which a Nation has *an absolute and exclusive right to set Law*, some risk of confusion may ensue if we speak of any part of the open sea over which a Nation has only a *concurrent right to set Law*, as its *Maritime Territory*. It would tend to greater clearness, if Jurists were to confine the use of the term *Maritime Territory* to the actual coasts of a Nation, or to those portions of sea over which a Nation by practice is entitled to *exclusive jurisdiction*, and over which its Territorial Law has paramount force and operation, and were to designate the extent of tidal waters over which the Territorial Law of a Nation operates *concurrently* with the Law of Nations as its *Jurisdictional Waters*[17].

Territorial Seas distinguished from Jurisdictional waters.

§ 174. If a sea is entirely enclosed by the Territory of a Nation, and has no other communication with the Ocean than by a channel of which that Nation may take possession, it appears that such a sea is no less capable of being occupied and becoming property than the land, and it ought to follow the fate of the country that surrounds it[18]. The Black Sea, whilst its shores were in the exclusive possession of the Ottoman Porte, was an instance of a Territorial Sea of this character. So likewise Straits, which serve as a communication between two seas, and of which the shores on both sides are the Territory of one and the

[17] Vattel, L. I. § 292. Wolff, § 128.

[18] Mr. Justice Story has adopted this expression in his judgment in the Schooner Fame, 3 Mason's American Reports, p. 152.

same Nation, are capable of being reduced into the possession of that Nation. In the same manner a bay of the Sea, the shores of which are the Territory of one and the same Nation, and of which the entrance may be effectively defended against all other Nations, is capable of being reduced into the possession of a Nation. "By this instance," writes Grotius[19], "it seems to appear that the property and dominion of the Sea might belong to him who is in possession of the lands on both sides, though it be open above as a gulf, or above and below as a strait, provided it be not so great a part of the Sea, as when compared with the lands on both sides, it cannot be supposed to be a portion of them."

Puffendorf[20], to the same effect, says, "that gulfs and channels or arms of the Sea are, according to the regular course, supposed to belong to the people with whose lands they are encompassed." Whenever a Nation has an exclusive right over an entire sea, or over a bay, or over straits, no other Nation can claim a right of navigation therein against its will. But in case the opposite sides of a bay or strait are inhabited by different Nations, then under the general principle of the Law of Nations, each Nation has a right to go to the central line, drawn at low water mark, as the limit of its maritime territory[21]. But although the territorial limit of either Nation for purposes of absolute jurisdiction may not extend beyond the central deep-water line, yet the right of *innocent use* of the entire bay or strait for the purposes of navigation or passage may be common to both Nations. Such a right does not destroy the territorial jurisdiction of each Nation as far as the middle of the stream, but it

[19] De Jure Belli et Pacis, L. II. c. 3. § 8.

[20] Law of Nature and of Nations, L. IV. c. 5. § 8.

[21] Ibid.

is in the nature of an *easement*, as it is called in English Law, or a *servitude*, as it is termed in the Roman Law[21]. It is in fact analogous to the right of *private way* over the land of another. This right of passage and navigation must exist as a common right in all those cases, where such passage or navigation is ordinarily used by both Nations, and is indispensable for their common access to their own shores. A river or bay may be so narrow, or so irregular, or so liable to difficulties from winds, waves and currents, that it cannot be navigated by either Nation, without each having a right of passing over the whole waters at all times. If in such a case no exclusive right is recognised in either Nation, the constant use by both is a conclusive proof of a common right of passage and navigation in both.

Prescriptive right over portions of the Sea.

§ 175. In the case of portions of the Sea, a Nation may have a peculiar possession of them, so as to exclude the universal or common use of them by other Nations[22]. Lord Stowell held that portions of the Sea might be prescribed for[23]; and Mr. Justice Story deemed it possible that a Nation might have an exclusive use founded on the acquiescence or tacit consent of other Nations. There is no inconsistency between these views and those of Grotius, who says, "that he who has occupied any part of the Sea cannot lawfully hinder the navigating therein of ships that are unarmed, and give no room to apprehend danger;" for Grotius must be understood as speaking of the *natural* right of a Nation, and not of an *instituted* right founded on the tacit consent of other

[21] Instit. II. Tit. 3. De Servitutibus. Hugo, Histoire de Droit Romain, T. I. § 202. Klüber, § 137.

[22] Klüber, § 133.

[23] The Schooner Fame, 3 Mason's Repts., p. 150. The Twee Gebroeders, 3 Rob. p. 339.

Nations[24]. Lord Stowell[25] has observed that the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established on the part of those claiming it, in the same manner as all other legal demands are to be substantiated by clear and competent evidence; in other words, by proof of ancient and constant usage.

Right of fishery on the High Seas.

§ 176. The right of fishing in the open Sea or main Ocean is common to all Nations, on the same principle which sanctions the common right of navigation, namely, that he who fishes in the open Sea does no injury to any one, and the products of the Sea are in this respect inexhaustible and sufficient for all. It is possible indeed that one Nation may possess an exclusive right of navigation and fishing against another Nation, by virtue of treaty-engagements, as it is competent for a Nation to renounce a portion of its rights; and there have been instances of such renunciations both in ancient and modern times. Thus by the Treaty of Vienna, (16 March, 1731,) the House of Austria renounced in favour of the British and the Dutch the right of her subjects to send ships from the ports of the Low Countries to the East Indies. So by a Treaty concluded (anno 1400) between Henry VII of England and John II of Denmark, and by another treaty (anno 1523) concluded between Henry VIII of England and Christian II of Denmark, it was agreed that the merchants and fishermen of England should fish and traffic upon the Northern Sea betwixt Norway and Iceland, under the condition of first asking leave and renewing their Licences every seven years (de septennio in septennium) from the

[24] Puffendorf, L. IV. c. 5. § 8.

[25] The Twee Gebroeders, 3 Rob. p. 339.

Kings of Denmark and their Successors. At a later period the Dutch appear to have admitted the exclusive right of the British to the fisheries in the North Sea, by making payment and taking out licences to fish, which payment and licences were afterwards suspended by Treaties between England and the Burgundian Princes. "All this," writes Grotius[26], after citing various instances of treaties from ancient history, "does not prove that those who thus *limited* the navigation of any other people had taken possession of the sea, or of the right to sail there. For Nations as well as private persons may give up not only that right, which is properly their own, but that also which they have in common with all mankind, in favour of him for whose interest it is made." Treaties of this order have now fallen entirely into disuse.

Neutrality of jurisdictional waters.

§ 177. The Neutralisation of portions of the Sea, that is, the exclusion of Foreign Nations from the use of its waters for belligerent purposes, does not conflict with those considerations of Natural Right, which forbid the exclusion of Foreign Nations from the peaceful use of its waters. It may be regarded as an established rule of Public Law, that a Nation may prohibit all acts of hostility on the part of other belligerent Nations within the limits of its Maritime Jurisdiction, including the open Sea along all its coasts within the distance of a marine league. The same privilege is enjoyed in respect of Bays or Sea-Chambers[27], that is, portions of the Sea cut off by lines drawn from one headland to another. The

[26] L. II. c. 3. § 4.

[27] Life of Sir Leoline Jenkins, T. II. p. 727, 728, 780. Opinion of the Attorney-General of the United States on the case of the Ship Grange, 14 May, anno 1793, T. I. p. 15. Waite's American State Papers, T. I. p. 73.

claim of Neutrality, however, cannot be maintained to the extent of prohibiting a belligerent Power from passing over waters, claimed as neutral waters, with a view to an ulterior act of warfare against the Enemy. The act of passing inoffensively over such portions of water without any violence committed therein, is not considered as any violation of Neutral privileges; such waters are regarded in times of war, equally as of peace, as the common thoroughfare of Nations, and no permission is required for liberty to pass through them; although they are privileged so far, that no actual acts of hostility may be committed within them. In certain cases the privilege of Neutrality seems to extend over portions of the Sea which are not within the ordinary limits of the maritime jurisdiction of a Nation; as for instance, over arms of the Sea, and over broad Straits, such, for example as the Strait which separates Ireland from Great Britain, commonly called St. George's Channel[28]. But this question belongs more properly to the Rights of Nations in time of War, and will be considered more fully in a subsequent part of this work. Bynkershoek makes one exception to the violation of Neutral Waters, and supposes that if an enemy should be attacked upon the High Sea, and take refuge within the jurisdictional waters of a Neutral Nation, the victor may pursue his vanquished foe *dum fervet opus*, and seize his prize within the jurisdiction of the Neutral State. Casaregis and some other foreign jurists maintain a similar doctrine; but Valin, Emérigon, Vattel, Azuni, and others are of an opposite opinion, and hold that when the flying enemy has entered the privileged limits of the Neutral Jurisdiction, he is under the safeguard of the

[28] Martens, Précis, § 42.

Neutral Power. Lord Stowell[29] seems to consider that Bynkershoek's opinion is given with many qualifications, and expressly as an opinion which he did not find to have been adopted by any other writer, and Mr. Chancellor Kent[30] regards Bynkershoek's opinion as rested by him entirely on the authority and practice of the Dutch, and not confirmed either by the writings of Publicists or the Usage of Nations. He holds, accordingly, that the opposite doctrine rests upon sounder views. In this equally as in any other case, a positive act of warfare would be in strict Law a violation of the privilege of the Neutral Power, which is entitled to protect all persons and property within its Maritime Jurisdiction. It is the privilege however of the Neutral Power alone to insist on the restoration of property captured within its Jurisdiction, and if there should have been extreme bad faith on the part of the worsted belligerent, as, for instance, if he should have lain in wait within the shelter of Neutral waters with a view to sally out suddenly, and take his adversary at a disadvantage, with the intention, if he should be worsted, to take refuge again within the Neutral waters, the Neutral Power may with reason decline to extend its shield over the vanquished, if the enemy whom he has attacked should pursue him *dum fervet opus*, and capture him within the Maritime Jurisdiction of the Neutral Power. It is sometimes a matter of treaty-engagement[31] between two Nations, that neither shall permit the ships or goods belonging to the citizens or subjects of the other to be captured within cannon shot of their

[29] The Anna, 5 Robinson, p. 385.

[30] Commentaries on American Law, Tom. I. § 120.

[31] Treaty between Great Britain and the United States, (anno 1794,) Art. 25. Martens, Recueil, V. p. 684.

coast, or in any of the bays, ports, or rivers of their territory by the ships of war of a third Power.

Right of Maritime Toll in respect of Light-houses and Sea-marks.

§ 178. It is not contrary to the Law of Nature or that of Nations, writes Grotius[32], that those who shall take upon them the burden and charge of securing and assisting Navigation, either by erecting or maintaining Lighthouses, or by affixing Sea-marks to give notice of Rocks and Shoals, should impose a reasonable tax on all who sail that way. Martens classes this right amongst the *Jura litoris*. Azuni[33] considers that the Maritime Powers have a right to impose contributions upon all vessels, which are navigated within the limits of their Maritime Jurisdiction, to defray the expenses which are necessary to secure the safety or convenience of navigation. Accordingly if fire-beacons are kept alight on shore or afloat during the night, and buoys are placed upon the shoals to indicate the deep and shallow water passages, and skilful mariners acquainted with the dangers of the navigation are kept ready to act as pilots at the call of foreign vessels, and to conduct them safely along the coasts of a Nation; it is not contrary to the Law of Nature or of Nations that foreign vessels availing themselves of these aids to navigation, should be required to contribute to the expenses of maintaining them. Baldus[34] holds Sea-tolls to be most equitable in their nature, when they are levied to promote the security of navigation: "Vectigalia Maritima sunt æquissima, quoniam ad tuitionem maris et veram in eo securitatem præstandam constituta reperiuntur." Every vessel, which casts anchor within the jurisdictional waters of a Nation, becomes liable to the jurisdiction of that Nation in regard to all reasonable dues

32 L. II. ch. III. § 4. L. IV. ch. IV. § 153.
33 Droit Maritime de l'Europe, 34 Baldus, Tit. de rer. div. col. 2.

levied for the maintenance of the general safety of navigation along its coasts[35]. If a vessel merely passes along the coasts of a Nation without casting anchor within the limits of a marine league, or without entering any port or harbour, it is not subject to the payment of any territorial dues. The Right of Passage over all portions of the open Sea is one of the Natural Rights of Nations. It can only be made subject to conditions by established Custom, which implies an immemorial acquiescence on the part of all Nations.

Prescriptive Right of Sea Toll.

§ 179. The Right which a Nation has to levy contributions upon all ships which come within its Maritime Jurisdiction towards the maintenance of Lighthouses, Beacons, and other accessories to the safety of navigation, must not be confounded with a right which a nation may possess by Prescription to levy toll upon passing vessels[36]. The Sound Dues formerly levied by Denmark upon all vessels passing through the Sound and the Two Belts rested upon an immemorial prescription. The actual origin of these Dues is lost in the obscurity of a remote antiquity, and it must remain undetermined whether the Northmen, who were masters of the narrow Straits leading from the North Sea into the Baltic Sea, levied toll arbitrarily upon all passing vessels, as a consideration for permission to pass through the Straits unmolested, or as a compensation for expenses incurred by them in securing the safe navigation of the Baltic Sea by keeping it clear of pirates, and by maintaining Lights and Sea-marks to indicate the navigable channels. It is unquestionable, however, that, at the

The Sound Dues.

35 Azuni, Droit Maritime, ch. II. Art. IV. p. 288.

36 The Dukes of Savoy at one time levied a toll, under the name of Villefranche, on all vessels passing within eighteen miles distance from the port of Nice. Azuni, T. I. p. 281.

period when a system of Public Law began to regulate the intercourse of Nations, the claim to levy a toll upon a narrow Sea-passage, like the Sound and the Belts, was in strict conformity with the prevailing ideas as to the Right of Empire, which a Nation might exercise over Straits of the Sea, the passage of which it could effectively control. Vattel[37], for instance, places the right of Denmark to levy customs on the passage of the Sound on the same foundation with the right of a Nation to establish tolls upon land or upon a river. Whatever may have been the origin of the Sound Dues, the absolute Right of Denmark to the control of the Sea-passages into the Baltic was acknowledged by the Hanse Towns in a treaty as early as 1368, and by England as early as 1490; and the payment of tolls on the passage of the Sound was recognised *as in previous use* (wie vor alters her), in a treaty concluded at Spires, anno 1544, between the Emperor Charles V and King Christian III of Denmark[38]. This treaty regulated the amount of the tolls, and formed a precedent for similar treaties between Denmark and other Nations[39]. This Right has accordingly been rested by Danish Jurists on immemorial Prescription, sanctioned by the concurrent evidence of a long series of Treaties recognising the existence of these tolls "as of olden time," and stipulating only as to the amount and mode of levying them.

The Sound Dues may henceforth be regarded as matters of history, rather than of practical interest, except as illustrating an Exceptional Right, which may have been in conformity with the General Law at the

37 Droit des Gens, L. I. § 291.

38 Schmauss, Corp. Jur. Publ. I. p. 258.

39 The treaty of 1645 is in Schmauss, I. p. 536.

time of its origin, but which in modern times rested upon a very special foundation. The tolls were levied upon the tonnage of the ships and also upon the value of the goods laden on board, and the inconvenience to modern commerce, resulting from merchant vessels being obliged to bring up either at Elsinore if they passed through the Sound, or at Wyborg if they passed through the Great Belt, was found to be so great, that the maritime Nations of Europe[40] have entered into a Convention with Denmark to redeem the tolls for ever; in other words, to purchase for their own vessels the freedom of the navigation of the Sound and the Belts; and the United States of America, which had for a short time disputed the Prescriptive Right of Denmark as against a State of the New World, has followed the example of the European Powers, and has entered into similar Treaty-engagements with Denmark in behalf of American vessels[41].

The Straits between the Mediterranean and the Black Sea.

§ 180. The exclusive Right which the Ottoman Porte exercises over the Straits and the intermediate sea which connect the Mediterranean with the Black Sea, rests upon a Prescription which has obtained the formal sanction of the Great Powers of Europe, under Conventions concluded between them and the Porte. The Right of the Porte had a lawful origin at the time when the shores of the Black Sea were in the exclusive possession of the Ottomans, but after Russia had made large territorial acquisitions on its shores, the latter Power, under the Common Law of European Nations, had a right to navigate the waters of the Black Sea, and to pass outwards with trading vessels

[40] Treaty of Copenhagen, March 14, 1857. Martens, N. R. Gén. XVI. pt. II. p. 345.

[41] Treaty of Washington, April 11, 1857.

into the Mediterranean. But the Ottoman Porte did not at that time acknowledge any Public Law in common with the Christian Powers of Europe, and the latter Powers had not the right, if they had possessed the might, to impose their system of law upon the Ottoman Nation. Accordingly as the Ottomans regarded no other law as binding upon them with regard to Christian Nations, than the express stipulations of treaties, the free navigation of the Straits was secured to the merchant vessels of Christian Nations by express Conventions on the part of the Porte, with Russia in 1774, with Austria in 1784, with Great Britain in 1799, with France in 1802, with Prussia in 1806. The Porte has meanwhile kept the Straits closed against the war-ships of all Nations during the time when it has itself remained at peace with all Nations, and this practice of the Porte obtained a formal sanction, as an ancient rule of the Ottoman Empire, from the Great European Powers with the exception of France, in the Treaty concluded in London, July 13, 1841[42]. It has since been more formally confirmed as part of the Public Law of Europe by the Treaty of the Straits, annexed to the Treaty of Peace concluded at Paris, March 30, 1856[43].

The Comity of Nations in Matters of Revenue and Quarantine.

§ 181. There is a certain class of cases which seem at first sight to conflict with the position that a geographical league seawards along its coasts is the limit of the maritime jurisdiction of a Nation, and that beyond that distance its Civil Law is in operation only over its own National vessels. Thus the Statute Law of Great Britain (9 Geo. II. c. 35 and 24 Geo. III. c. 47.) sometimes described as the Hovering Acts, authorises the National cruizers to seize all merchant

[42] Martens, N. R. Gén. II. p. 128. [43] Id. T. XV. p 782.

vessels, which are found with certain cargoes on board destined for Ports of Great Britain, if they are found within the distance of four leagues from the Coast, and vessels so seized have been brought for adjudication before the tribunals of the seizors, and have been declared forfeited for an attempt at illicit trade. So, again, by 26 Geo. II. all vessels coming from places from whence the plague might be brought, and therefore liable to Quarantine, were required to make signals on meeting other ships within four leagues[44] of the United Kingdom under a penalty of £200. In a similar manner the Acts of Congress of the United States of North America, such as the Collection Act of 1799 and the Act of 1807 against the importation of slaves, authorised the seizure of vessels laden with certain cargoes within four leagues of the American Coasts. The regulations of Portugal and of Spain, excluding the commercial intercourse of foreigners with their respective Colonies, were of an analogous character. Such laws and regulations, however, have no foundation of *strict Right* against other Nations. Lord Stowell in the well known case of the Louis[45] alludes to an instance of this kind in the case of a Swedish Ordinance authorising Swedish cruizers to examine foreign vessels *on the high seas* bound to Swedish Ports, which however was resisted by the British Government as unlawful, and the claim was finally withdrawn by the Swedes. In a similar manner Great Britain complained of the right claimed by Spain to search British vessels on the High Seas, which was carried so far that the Spanish *guardacostas* seized

44 The distance within which vessels are regarded as amenable to British Quarantine Regulations is fixed at two leagues from the British Coasts by 6 Geo. IV. c. 78.

45 2 Dodson, p. 246.

vessels not in the neighbourhood of their coasts. This practice was the subject of long and fruitless negociations, and led at length to open war. Great Britain, however, did not contend that British vesels actually engaged in illicit trade were entitled to pass unmolested by the revenue cruizers of Spain until they came within the maritime jurisdiction of that country, but she maintained that Spain enforced her right of search for the protection of her commerce with her Colonies in an unreasonable and vexatious manner. Mr. Justice Story[46] has properly pointed out that the State which authorises her cruizers to effect such seizures beyond the limits of her Maritime Jurisdiction, incurs a responsibility towards Foreign Powers. It is only under the *Comity of Nations*[47] in matters of Trade and Health, that a State can venture to enforce any portion of her Civil Law against foreign vessels, which have not as yet come within the limits of her Maritime Jurisdiction. A State exercises in matters of Trade for the protection of her Maritime Revenue, and in matters of Health for the protection of the lives of her people a Permissive Jurisdiction, the extent of which does not appear to be limited within any certain marked boundaries, further than that it cannot be exercised within the Jurisdictional waters of any other State, and that it can only be exercised over her own vessels and over such foreign vessels as are bound to her ports.[48] If, indeed, the Revenue Laws or the Quarantine Regulations of a State should be such as to vex and harass unnecessarily foreign commerce, foreign Nations will resist their exercise.

[46] The Mariana Flora, XI. Wheaton, p. 40. Church v. Hubbard, 2 Cranch, p. 235.

[47] Kent's Commentaries, Tit. I. § 31.

[48] The Apollo, 9 Wheaton, p. 371.

If, on the other hand, they are reasonable and necessary, they will be deferred to *ob reciprocam utilitatem*. In ordinary cases indeed, when a merchant ship has been seized on the open seas by the cruizer of a Foreign Power, when such ship was approaching the coasts of that Power with an intention to carry on illicit trade, the Nation, whose mercantile flag has been violated by the seizure, waives in practice its right to redress, those in charge of the offending ship being considered to have acted with *mala fides* and consequently to have forfeited all just claim to the protection of their Nation.

Right of Fishery.

§ 182. The Right of Fishery comes under different considerations of Law from the Right of Navigation, as the Right of Fishery in the *open sea* within certain limits may be the exclusive Right of a Nation. The *usus* of all parts of the open sea in respect of navigation is common to all Nations, but the *fructus* is distinguishable in law from the *usus*, and in respect of fish, or zoophites, or fossil substances, may belong in certain parts exclusively to an individual Nation. The Practice of Nations has sanctioned the exclusive Right of every Nation to the fisheries in the waters adjacent to its coasts within the limits of its Maritime Jurisdiction,[49] and accordingly we find that a permission for the subjects of one Nation to fish within the Jurisdictional waters of another Nation is a frequent subject of Treaty-engagement. "The various uses of the sea," writes Vattel,[50] "near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber," &c. Now in all these respects its use is not inexhaustible; wherefore the Nation, to which the coasts belong, may appropriate

49 Wheaton's Elements, Part II. c. 4. § 5. Azuni, Tom. I. c. 11. Art. 8.

50 Droit des Gens, L. I. § 287.

to itself an advantage which Nature has so placed within its reach, as to enable it conveniently to make itself master of it and to turn it to profit, in the same manner as it has been able to occupy the dominion of the land which it inhabits. Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property? and though where the catching of (swimming) fish is the object, the fishery appears less liable to be exhausted, yet, if a Nation has on its coast a particular fishery of a profitable nature, and of which it may render itself master, shall it not be permitted to appropriate to itself that Natural benefit, as an appendage to the country which it possesses, and to reserve to itself the great advantages which it may derive by commerce, in case there be a sufficient abundance of fish to enable it to furnish the neighbouring Nations with a supply? But, if so far from making itself master of a fishery, a Nation has once acknowledged the common right of other Nations to come and fish there, it can no longer exclude them from it; it has left that fishery in its primitive state of communion, at least with respect to those who have been accustomed to take advantage of it." Treaty-engagements in such matters do not give any other right than that which is expressed in the specific terms, although there may be found in the recitals of certain Treaties recognitions of Rights founded on grounds independent of all Treaties. Thus there are early Treaties between France and England, under which it was agreed that the Subjects of either Crown might fish anywhere in the seas, which separate the two kingdoms, during certain seasons of the year. The legitimate inference, deducible from the fact that such fishery was made a matter of Treaty-engagement, is, that at other seasons of the year the Subjects of the

two Crowns had not a common right of fishing everywhere in those seas. The existing Treaty-engagements between Great Britain and France proceed upon another view of mutual convenience, namely, that it is desirable to define the limits within which the general right of fishing upon all parts of the coasts of either Nation shall be exclusively reserved to its own Subjects. The Convention of Paris (3 Aug. 1839)[51] has accordingly provided that the Subjects of either State shall enjoy *an exclusive right* of fishery within a distance of three miles from low water-mark along the whole extent of its coasts. There is one peculiar provision in this Convention which deserves notice. By the Ninth Article it is stated to be the understanding of both parties that the distance of three miles, limiting the exclusive right of fishery upon the coasts of the two countries, shall be measured in the case of bays, of which the opening shall not exceed ten miles, from a straight line drawn across from one Cape to another.

Ceremonial of the High Seas.

§ 183. The High Seas being the common highway of Nations, all Nations meet thereon on terms of equality. The Usage of Nations has accordingly established a Ceremonial of the Sea to be observed between the public vessels of different Nations, and between public and private vessels respectively which meet upon the High Seas[52].

The question of Maritime Ceremonial, as regards the High Seas, was at one time considered not to involve considerations of courtesy merely as between Nation and Nation, but to imply a recognition of superiority and an acknowledgment of inferiority, as

[51] Martens, N. R. XVI. p. 954.

[52] Klüber, § 127. Martens, Précis, § 158. Bynkershoek de Dominio Maris, c. 1. and 4. Wheaton's Elements, Pt. II. c. 3. § 7.

the case might be, on the one side or on the other, and disputes on this head have frequently given occasion to war[53]. Nations, for instance, have claimed Rights of Sovereignty over considerable portions of the open Sea, and have insisted upon the public vessels of other Nations lowering their flag when sailing in those seas; or they have asserted a general Maritime supremacy, and insisted upon the public vessels of other Nations striking their flag to their armed ships, whenever they should meet them upon the High Seas. All these pretensions are now matters of History, and as far as salutes between the vessels of different Nations on the High Seas are concerned, whether those salutes consist in striking the flag, (salut de pavillon,) or in lowering the sails, (salut des voiles,) or in firing a certain number of guns, (salut du cannon,) the Ceremonial is essentially a matter of courtesy. The Ceremonial as between public vessels is now confined entirely to a salute of guns. It is voluntary on either side, and it proceeds altogether upon a calculation of equality, as between Nations. All International salutes are therefore in strict practice to be returned gun for gun. In some cases this is matter of direct Convention between Nations; in other cases it is matter of courteous understanding between the commanders of the respective vessels; and Nations for the most part allow the commanders of their public vessels to reciprocate the special complimentary salutes, which the rules of their own service authorise in the case of one ship of war meeting another ship of war bearing the flag of an officer of superior rank. Thus a British ship[54] of war, bearing the broad

53 Ortolan, Diplomatie de la Mer, L. II. c. 15. Declaration of war by England against Holland, in 1652, and again in 1671.

54 Regulations relating to Salutes.

pendant of a Commodore, on meeting a French ship of war bearing an Admiral's Flag, may salute the French Admiral personally with the same number of guns to which a British Officer of corresponding rank would be entitled. It is understood, however, that the saluting vessel in such a case will receive a salute of gun for gun in return. A French vessel on the other hand, is authorised to return the salute of a foreign vessel gun for gun, whatever may be the rank of the respective commanders of the two vessels, provided that the salute does not exceed twenty-one guns, which is the number of guns, as generally understood, for a Royal Salute[55]. The practice of most Nations is to salute with an uneven number of guns[56], but the regulations as to the number of guns to be fired on each occasion varies with the pleasure of each Nation. The following rules are general[57]. A single ship of war by usage salutes a fleet or squadron, and an auxiliary squadron salutes the principal fleet. A vessel carrying a Captain's flag, salutes a vessel carrying a Commodore's broad pendant; and the latter in turn salutes the flagship of an Admiral. With regard to merchant vessels, the practice which prevailed in former days for them to salute the public ships of

55 Ordonnance du Roi du 1 Juillet, 1831.

56 It is stated by Martens, § 158. who is followed by Klüber, § 118. and several other publicists, "that Sweden is an exception to the rule of odd numbers, and that her vessels of war always salute with an even number of guns. The following are the regulations of the Swedish Navy, in the matter of naval salutes, published at Christiana, May 28, 1858. 1. A Swedish Man of War being saluted by a foreign vessel, answers the salute with the same number of guns. 2. No salute must exceed twenty-one guns, even in answering a salute. 3. In foreign harbours it is left to the discretion of the Commanders to follow the rules of other Nations. 4. The salutes in the Swedish Navy vary from five, seven, nine, &c., to twenty-one.

57 Martens, Précis, § 160. Klüber, § 122.

all Nations, has fallen into desuetude. It was a practice grounded originally on the fact, that the public ships of all Nations keep sentinel over the safe navigation of the High Seas, and in discharge of such duty are entitled to ascertain the character of all vessels navigating thereupon. Merchant vessels were accordingly bound to strike their flag, and lower their topsails to every vessel of war which they met. As a matter of courtesy in modern times, merchant vessels for the most part salute the public vessels of other Nations by lowering and rehoisting their flag three times. Ships of war, indeed, are so far entitled to maintain guard over the safe navigation of the high seas, that they may rightfully compel a vessel, which does not exhibit any flag, to announce her National character by hoisting her colours, and for this purpose they are accustomed to fire a gun with blank cartridge as a signal to the merchant vessel to hoist her colours; if she neglects the notice, they may fire a shotted gun across her bows, and if after that warning she declines to hoist her colours, a ship of war may treat her as a vessel of no certain Nationality, and may compel her to bring to.

The regulations with respect to salutes to be rendered by merchant vessels to ships of war of their own Nation, are matters of Municipal regulation, as well as those which relate to the special flag, which merchant vessels are entitled to carry; but it is an offence by the Laws of the Sea for any private ship to wear the flags or ensigns peculiar to the public ships of its Nation, unless it has a commission from the Sovereign Power, which authorises it so to do; for the Public flag of a Nation represents the Nation itself, and is privileged accordingly; whereas the Mercantile flag of a Nation has freedom of access

allowed to it upon implied conditions of a totally different kind.

Ceremonial within Jurisdictional waters.

§ 184. There is an order of Maritime Ceremonial which may be distinguished from the Ceremonial observed on the High Seas, and which implies a recognition of the Empire of a Nation over the navigable waters within which the Ceremonial is observed. Every Nation has by usage a right to order a Ceremonial to be observed by the vessels of all Nations, which come within its Maritime Jurisdiction, in relation to its own National vessels or to the vessels of other Nations; and likewise in regard to its own fortresses or naval arsenals[58]. Bynkershoek rests this right upon the ground that all who enter within the Maritime Jurisdiction of a State are for the time subjects of that State. This may be a correct view of the condition of Public Law, under which private vessels of commerce leave the High Seas and enter the jurisdictional waters of a Foreign Power; namely, that they become subject temporarily to the Territorial Law of that Power. With regard to such vessels, there is no necessity for any *special* Convention respecting matters of Maritime Ceremonial, as between Nations; but with regard to public vessels, which represent the Nation in its character of an Independent Power, the question is subject to different considerations. The salute on the part of a public vessel depends either upon the Usage of Nations, or upon Treaty-engagements[59]. By the Usage of Nations, ships of war always salute a fortress, if they pass within the limits of the Maritime

58 Bynkershoek, Qu. Jur. Publici, L. II. c. 21. Klüber, § 120. Martens, Précis, § 159.

59 In the treaties between the Barbary States, and the Christian States of Europe, the Salute was matter of arrangement as to the number of guns.

Jurisdiction of the Nation to which the fortress belongs: they salute in like manner the guardship of a foreign port before they enter it, and the salute is reciprocated with the same number of guns, which tends to show that the salute is not a one-sided acknowledgment of temporary subjection, but is a mutual recognition of National Independence on either side. Nations in former times have asserted a right to exact a salute from the public ships of foreign Nations navigating narrow seas, or gulfs, as an acknowledgment of their having a right of Empire over such seas and gulfs[60]. Claims of this kind have given rise to long and disastrous wars, and their regulation has been repeatedly the subject of negociations and treaties; they have now happily everywhere fallen into desuetude, seeing that the Ceremonial of the Salute is no longer connected with the idea of the supremacy of one Nation over another.

[60] Thus Great Britain once asserted a Right of Empire over the British Channel; Venice over the Adriatic Sea; Genoa over the Ligurian Sea; Portugal over the Lusitanian Sea. Gunther, Tom. II. § 21–25.

CHAPTER XI.

RIGHT OF LEGATION.

Origin of Legations—The Person of an Ambassador sacred—The Right of Legation an Imperfect Right—Reception of an Ambassador discretional—Conditional Reception of a Subject as a Foreign Minister—Various Orders of Diplomatic Agents—Classification of Public Ministers in the Eighteenth Century—Rule of the Congress of Vienna—Diplomatic Agents of the First Class—Diplomatic Agents of the Second Class—Diplomatic Agents of the Third and the Fourth Class—Resident Missions—Moldavian and Wallachian Chargés d'Affaires at the Ottoman Porte—Letters of Credence—Letters of Recommendation—Full Powers—Instructions—Ceremonial of Reception—The Sacred Character of an Ambassador—His Extra-Territoriality—Extra-Territoriality of the Ambassador's Hotel and of his Suite—The Ambassador's Jurisdiction over the *personnel* of the Embassy—Liability of an Ambassador to the Payment of Local Dues—Liberty of Religious Worship—Inviolability of an Ambassador passing through the Territory of a Third Power—Consuls not Diplomatic Agents.

Origin of Legations.

§ 185. NATIONS, being independent political communities not acknowledging any Political Superior, hold intercourse with one another upon terms of equality, and upon the presumption of mutual good faith. But the whole body of a Nation cannot confer with the whole body of another Nation, although the interests of an Independent Political Community may from time to time require it to enter into negociations with another Independent Political Community, not merely for the purpose of forming special Conventional Relations, but likewise with the object of maintaining its existing relations under the General Law. It thus becomes necessary that a Nation should depute one or more individual members of its Body with full Powers

on its behalf to negociate with another Nation, and it has been the practice of Nations to confide in the good faith of one another, that the Persons of their Representatives shall be in safe-keeping whilst they are within the jurisdiction of the Nation to whom they have been accredited.

The Person of an Ambassador Sacred.

§ 183. The word *Ambassador* or *Embassador* is derived by Wicquefort[1] from the Spanish word "Embiar," which signifies "to send." The Latin equivalent was *Legatus* or *Orator*,[2] and such is the title given by the Roman Emperor of the Germans and by the States General of the Netherlands in their ancient records to their Ambassador accredited to the Ottoman Porte. Much which is found in the Digest of Justinian[3] in respect to *Legati* applies to delegates from the Provinces or *Municipia* of the Roman Empire, who were sent to the Capital with Commissions to advocate the interests of the Provincial or Municipal Bodies whom they represented. But the principle of Law, regarded as a Rule of Reason promulgated for the common good, which was applied by the Roman Jurists to questions which arose touching *Legati* of this order, are equally applicable to Ambassadors sent from one Independent State to another, and it is worthy of note that the Romans, who regarded foreigners as out of the pale of the *Jus Civile*,[4] still held that the person of a foreigner was sacred, if he was invested with the representative character of his Nation. "Si quis legatum hostium pulsasset, contra

[1] Wicquefort, L'Ambassadeur et ses Functions, L. I. p. 3.

[2] Bynkershoek, De Foro Legatorum, L. I. c. 1.

[3] Dig. XLVIII. Tit. VI. § 7.

[4] Adversus hostem (peregrinum) æterna auctoritas esto; Law of the Twelve Tables. Gravina, de Jure Naturali, Gentium et XII Tabularum. Lipsiæ, 1737, p. 284.

Jus Gentium id commissum esse existimatur, quia *sancti habentur legati.*"[5]

The Right of Legation an Imperfect Right.

§ 184. The Right of Legation forms the first and principal head of the Voluntary Law of Nations in the system of Grotius.[6] This right belongs only to States which are independent, "qui summi imperii sunt compotes inter se." Every State, which is *sui juris*, is entitled to constitute a Representative and to accredit him to another State which is willing to receive him. But a Nation is not obliged to receive a Representative Envoy from another Nation. Grotius holds that the Law of Nations does not require that all Ambassadors should be received, but that they are not to be excluded without just cause, and that such cause may exist either on the part of the person who sends, or the person who is sent. The instances, which Grotius[7] cites in illustration of the just causes of refusal, seem to resolve themselves into cases where the Nation which sends the Ambassador is considered to be an enemy, or where the person sent as Ambassador is supposed to be a man of bad faith, or where the Embassy itself is held not to be sent in good faith. Vattel,[8] on the other hand, holds that a Sovereign cannot without very particular reasons refuse to admit and hear the Minister of a Friendly Power or of a Power with which he is at peace; but if there are good reasons for not admitting him into the heart of the country, the Sovereign may notify to the Minister,

5 Dig. L. Tit. VII. § 17. De Legationibus.

6 Restat veniamus ad obligationes quas ipsum per se jus illud Gentium, quod voluntarium dicitur, induxit: quo in genere præcipuum est caput de Jure Legationum. De Jure Belli et Pacis, L. II. c. 18. § 1.

7 Ibid. L. II. c. 18. § 3. Causa esse potest ex eo qui mittit, ex eo qui mittitur, ex eo ob quod mittitur.

8 Vattel, Droit des Gens, L. IV. c. 5. § 65.

that he will send proper persons to meet him at an appointed place on the frontier, there to receive his proposals. It then becomes the duty of the Foreign Minister to halt at the place assigned; it is sufficient that he obtains a hearing, as that is the utmost he has a right to expect. Klüber[9] considers that no Nation, except under Treaty-engagement to that effect, is bound to receive the Ambassador of another Nation, except when the purpose of the Mission is either to discuss or establish a Right contested by the other Nation, and the object in view cannot be attained in any other manner, or to terminate in an amicable way a dispute occasioned by an evident violation of Right on the part of the Nation to which the Mission is sent. Ch. De Martens[10] concurs with Klüber as to the cases in which alone a Nation is bound to receive an Embassy from another Nation. Wheaton,[11] on the other hand, holds that "no State is obliged by the Positive Law of Nations to send or receive public Ministers, although the Usage and Comity of Nations seem to have established a reciprocal duty in that respect. It is evident, however, that this cannot be more than an imperfect obligation, and must be modified by the nature and importance of the relations to be maintained between different States by means of Diplomatic intercourse."

Reception of an Ambassador discretional.

§ 185. As a Nation is not under any perfect obligation to receive an Ambassador, it may annex such conditions as it pleases to his reception, short of anything affecting his personal inviolability. A Nation may refuse to receive a particular individual who has been accredited to it by another Nation, and instances

9 Klüber, Droit des Gens, I. § 6. § 176.

10 Guide Diplomatique, Tom. § 2.

11 Elements, Part III. c. 1.

of such refusal are by no means unfrequent.[12] It is usual in the present day in order to avoid any misunderstanding, which might arise from the refusal of a Nation to receive the Envoy of another Nation on the ground of a personal objection, to intimate beforehand the name of the person whom it is proposed to accredit. This is an act of courtesy on the part of the Nation which makes the communication, but the practice is in itself reasonable and ought to be upheld; for if a diplomatic Envoy is not welcome to the Sovereign to whom he is sent, he cannot be expected to gain his confidence, and, unless he enjoys a certain amount of Personal consideration, his Public Character alone will fail to secure him that confidence.

Conditional Reception of a Subject as a Foreign Minister.

§ 186. A Nation may refuse to receive one of its own citizens as the Representative of a Foreign Power, and in some countries it is a State-Maxim that a Subject is not to be received in such a capacity. Such was the rule of the French[13] and Swedish[14] Courts and likewise of the United Provinces.[15] But in recent times two French subjects have been accredited to and received by the French Court as the Representative Ministers of Foreign Powers, Count Pozzo di Borgo as Minister of Russia, and the Count de Bray as Minister of Bavaria. Ch. de Martens,[16] speaks of both these distinguished Diplomatists as having been naturalised in the foreign countries, which they respectively represented. This circumstance would

[12] Thus the King of Sweden refused in 1758, to receive Mr. Goderich, the British Envoy, who was thereupon under the necessity of returning home. So the King of Sardinia refused in 1792 to receive M. Semonville the Envoy from France.

[13] De Caillieres, Traité de la Manière de négocier avec les Souverains, c. 6. p. 72.

[14] Codex Legum Sueciæ. Tit. de Crimin. § 7.

[15] Bynkershoek, de Foro Legatorum, c. 11.

[16] Guide Diplomatique, Tom. I. c. 11. § 6.

tend to prevent all conflict in their case between the International Privileges of a Foreign Ambassador and the Civil Liabilities of a Natural-born Subject of the French Crown, inasmuch as it is provided by the Municipal Law of France that the quality of a Frenchman is lost by Naturalisation acquired in a foreign country[17]. A similar rule of Law obtains in most countries with the exception of Great Britain, which does not allow a Natural born Subject to renounce or discharge his allegiance to the Crown of Great Britain and Ireland under any circumstances[18]. "Nemo potest exuere patriam" is an Imperial maxim, which British tribunals must strictly uphold.

It seems open to question, if a Sovereign Power has consented to receive, as the Representative of a foreign Nation, one of its own Natural-born Subjects without any express reservation of its Sovereign authority over him, and in a case in which such authority has not been divested under some general provision of its Municipal law, whether such an unconditional reception is not a waiver of all authority, which it might otherwise assert over him on the ground of his origin. Wheaton inclines to think that the unconditional reception of a Subject in the character of a Representative of a foreign Nation is a waiver of all personal jurisdiction over him on the part of the Sovereign which has received him[19]. Dr. Phillimore[20] is of opinion that if a Subject be received without any previously promulgated stipulation upon

[17] La qualité de Français se perdra par la naturalization acquise en pays étranger. Code Civile, Art. 17.

[18] Blackstone's Commentaries, Tom. II. c. 135. This is a relic of the period, when the conception of "territorial Sovereignty" was imperfectly developed.

[19] Elements, Part III. c. 1. § 15.

[20] Commentaries, Tom. II. c. 135.

the part of his own Sovereign who receives him, he will be entitled to the full *Jus legationis*. Vattel in discussing this question says, that "a Natural-born Subject of a State may, without renouncing his country for ever, become independent of it during the whole time that he spends in the service of a foreign Prince," and the presumption is certainly in favour of such independence, for the *Status* and Functions of a Public Minister naturally require, that he should depend only on his Master or the Prince who has intrusted him with the management of his affairs. Whenever, therefore, there does not exist any circumstance which furnishes a proof or indication to the contrary, a Foreign Minister, though antecedently a Subject of the State to which he is accredited, is reputed to be absolutely independent of it during the whole time of his commission. If his original Sovereign does not choose to allow him such independence within his dominions, he may refuse to admit him in the character of a Foreign Minister[20].

Various Orders of Diplomatic Agents.

§ 187. In the early intercourse of European Nations a distinction of title amongst Diplomatic Agents was unknown. They were indifferently styled in Latin documents *Legati* or *Oratores*, and in more modern records they are designated Ambassadeurs, Ambasciadori, or Embascadores, respectively in French, Italian, and Spanish records. Grotius treats of *Legati* under a single head. The vanity of Princes in regard to Ceremonial on the one hand, and motives of parsimony on the other, contributed to introduce a distinction in or about the 15th Century between Diplomatic Agents who should represent the *personal dignity* as well as the *independent rights* of their Sovereign, and diplomatic agents who should represent *the affairs* alone

[20] Droit des Gens, L. IV. c. 8. § 112.

of the Sovereign who accredited them. Louis XI of France is said to have been the first of the European Sovereigns, who accredited to another Sovereign Power a Public Minister to represent him in the conduct of his affairs only, and not in respect of his personal dignity; and his example led the way to the introduction of two distinct classes of diplomatic Agents, a higher class representing the dignity of the *person* of their Constituent as well as his *affairs*, and a lower class simply representing him in the transaction of his *affairs*.

At the time when Vattel wrote his work on the Law of Nations a third degree of Representation had become established by Custom, and Vattel divides accordingly the Diplomatic Body into Ambassadors, Envoys, and Residents. In the Treaty of Peace concluded at Passarovitz[20] between the Emperor Charles VI and the Sultan Ahmed III (anno 1718) we find mention of three classes of Public Ministers as distinguished from the simple Agent[21], the latter of whom, if his functions were not commercial, was included in the protection of the same Treaty-stipulations which guaranteed the personal safety of other Public Ministers.

It is not easy to ascertain the precise line of demarcation, which distinguished the functions of the *Resident* from those of the *Envoy*, for the former class of Diplomatic Agents were more frequently than otherwise entrusted with the negociation of affairs of State

[20] Ministri porro Cæsarei, sive Oratoris, sive Ablegati, sive Residentis, sive Agentis munere fungantur. Schmauss, Corp. Jur. Gent. Academ. p. 1703.

[21] In the Treaty of Commerce and Navigation concluded at the same time and place between the same Powers, Agents are mentioned in the list of Officials connected with Commerce: pariter Consules, Vice-Consules, Agentes, Factores, Interpretes. Schmauss, p. 1717.

equally as the Envoy; but the office of Resident seems to have been held in less honour and consideration than that of Envoy, as it was frequently delegated to a subject of the State, to which the Resident was accredited. The title of Resident appears also to have been sometimes conferred upon persons who were only entrusted with the management of the private *affairs* of a Sovereign. The functions of the simple *Agent* on the other hand seem to have been originally very indefinite. Vattel speaks of him as having been formerly a kind of public Minister; but the title of Agent in Vattel's time had come in practice to be confined to persons appointed by Princes exclusively to transact their private affairs, and who were not unfrequently subjects of the Country where they resided. Such *Agents* are not the bearers of Letters of Credence properly speaking, and they are consequently not Public Ministers, nor under the protection of the Law of Nations, as such. *Residents* also appear sometimes not to have been furnished with Letters of Credence, and under such circumstances the *title* alone of Resident was no protection to them. This may serve as an explanation of the fact alluded to by Bynkershoek[22], that Wicquefort, who was a native of Amsterdam, was in the military service of the States General at the time that he was appointed the Resident of the Duke of Luneburg at the Hague. Wicquefort, notwithstanding his office of Resident, was cited before a Dutch Court and condemned to imprisonment for life. Bynkershoek holds that the office of Resident did not, under the Law of Nations, exempt Wicquefort from the jurisdiction of the Dutch Courts. The Office of Resident, as exercised in this case, seems to have differed very little from the office

[22] De Foro Legatorum, c. 11.

of a Consul or Commercial Agent, for Vattel[23] speaks of "Dutch Merchants who obtain the title of Residents of certain foreign Princes, and nevertheless continue to carry on their commerce, thereby sufficiently denoting that they remain subjects of the States General."

Classification of Public Ministers in the 18th Century.

§ 188. The Law of Nations, antecedently to the institution of permanent Foreign Missions at the different European Courts, did not recognise any distinction of Class or Order amongst Public Ministers. Each Minister or Envoy received such special consideration as the nature of his Mission entitled him to. But with the introduction of Resident Ministers, a question of Ceremonial and Precedence arose amongst the Representatives of Foreign Sovereigns at each Court. The Ambassador was received with higher honours, and took precedence of the Envoy. The Envoy, on the other hand, had precedence of the Resident; the Resident in his turn, being a Public Minister, took precedence of the Agent, whose duties were confined to the private affairs of his Sovereign. Such and so many were the grades of the diplomatic hierarchy at the commencement of the Eighteenth Century. The Agent has for the most part disappeared, and is replaced by the Chargé d'Affaires, but the French mission in Spain still retains amongst the *personnel* of its establishment *an Agent of the French Nation*, who is charged with the conduct of the affairs of his countrymen, which are of a secondary order[24].

In the course of the Eighteenth Century a practice was introduced of accrediting public *Ministers* without any particular designation of rank or character.

[23] Vattel, L. IV. c. 8. § 112.

[24] Ch. de Martens, Guide Diplomatique, Tom. I. § 12.

Vattel[25] states that this expedient was adopted to avoid dispute about precedence. Custom had at such time established a particular Ceremonial for the Ambassador, the Envoy, and the Resident, but such custom did not altogether prevent disputes between the Ministers of different Princes accredited to the same Court, as to their respective rank and precedence; more particularly when they happened to belong to the same Class or Order. Thus the Ambassador of an Emperor might claim to take precedence of the Ambassador of a King, by reason of the precedence which the Emperor himself claimed over all Kings. A King, on the other hand, might be indisposed to allow his Ambassador to concede precedence to the Ambassador of an Emperor, yet he might be equally indisposed to incur the risk of hostilities with his Master. Under such circumstances by accrediting his own Minister under the simple and indeterminate title of *Minister*, he could allow him to concede precedence to the Ambassador of an Emperor without compromising the dignity of his Crown.

We thus find the title of *Minister Plenipotentiary* introduced, such Minister Plenipotentiary taking rank immediately after an Ambassador. The office of Minister Plenipotentiary came gradually to be united with that of Envoy Extraordinary, and was placed in the same rank. Ministers Resident and Ministers Chargés d'Affaires shortly afterwards completed the Catalogue, which we find in general acceptance at the commencement of the Nineteenth Century.

Rule of the Congress of Vienna.

§ 189. The precise rank and precedence however of Diplomatic Agents was not a matter universally agreed upon amongst the Nations of Europe, until the Powers assembled in Congress at Vienna came to

[25] Droit des Gens, L. IV. § 74.

a common understanding on the subject, and established Three Classes[26]:

1. Ambassadors, Legates or Nuncios.

2. Envoys, Ministers, and others accredited to Sovereigns, (auprès des Souverains.)

3. Chargés d'Affaires accredited to Ministers of Foreign Affairs.

This classification proceeded upon a very intelligible distinction between the functions exercised by each Class. The Ambassador is accredited by a Sovereign to a Sovereign, and represents the *personal dignity* of his Constituent, as well as the *public affairs* of the Nation over which his Constituent rules. The Envoy or Minister is similarly accredited by a Sovereign to a Sovereign, but he represents only *the affairs of the Nation* over which his Constituent rules. The Chargé d'Affaires is not accredited by the Sovereign to the Sovereign, but is accredited by the Minister of Foreign Affairs to the Minister of Foreign Affairs. At the subsequent Congress of Aix-la-Chapelle, (21 Nov. 1818,) the five Great Powers there assembled agreed to institute a Class intermediate between the Envoy and the Chargé d'Affaires, to which they gave the title of *Ministers Resident* accredited to Sovereigns. The distinction thus introduced was not very logical, seeing that the extent of the second Class remained the same, and that the second is sufficiently large to include the third. The reasons for the introduction of this intermediate Class may be traced to the unwillingness of the Great Continental Powers to allow their Ministers of the Second Class to give way to the Ministers

[26] Réglement sur le rang entre les Agens Diplomatiques, being the seventeenth of the documents annexed to the Final Act of the Congress. Martens, N. R. II. p. 449.

of the same Class who represented the Minor Powers of Germany, and who might be entitled by Seniority, agreeably to the regulations of the Congress of Vienna, to take precedence of the Envoys of the Great Powers. The introduction of a Third Class under the title of Ministers Resident, accredited to Sovereigns, enabled the Minor Powers to avoid all contest with the Great Powers, and at the same time to have the services of Diplomatic Agents who were Public Ministers properly speaking.

Diplomatic Agents of the First Class.

§ 190. Diplomatic Agents of the first class alone enjoy by the Custom of Nations, as well as under the regulations of the Congress of Vienna, the full attributes of the Representative Character. They are accordingly entitled to the same honours as would be paid to the *person* of the Sovereign, whom they respectively represent. The precise nature of the Ceremonial, to which Ambassadors are entitled, depends upon the usage of the particular State to which they are accredited. It was provided by the fifth of the Rules adopted at the Congress of Vienna, that each State should settle an uniform mode of reception for Diplomatic Agents of each Class, so that the discretion of each State is left unfettered, provided it is not guilty of partiality towards the Representative of any one State. The third of the same rules provided, that Diplomatic Agents on an extraordinary Mission, should not by reason thereof (à ce titre) enjoy any superiority of rank; so that the Ambassador Extraordinary can claim no privilege or precedence over the Ordinary Ambassador. The Papal Nuncio[27] at present takes his place amongst

[27] The Ambassadors of the Roman Catholic Princes, including the Roman Emperor of the Germans, were accustomed in former times to cede precedence to the Papal Nuncio, but those of Russia and the Ottoman Porte did not recognise any such rule.

the Ambassadors in the order of Seniority, as it is provided by the fourth of the same rules, that Diplomatic Agents of the same Class shall take rank and precedence according to the date of the Official notification of their arrival at the Court, to which they are accredited.

The practice of accrediting Diplomatic Agents of the first Class is confined to the States which are entitled to *Royal Honours*. Such Honours were formerly enjoyed exclusively by Monarchical States, and the Republics of Venice and the United Netherlands were for some time exceptional instances of such honours being shared by States not having a Monarchical form of Government; at the same time, the Ambassadors of these powerful Republics were accustomed to yield precedence to the Representatives of Crowned Heads[28]. The Grand Duchies of Germany, the Electorate of Hesse, the Swiss and Germanic Confederations, are European States entitled to Royal Honours, and they are accordingly entitled to accredit Diplomatic Agents of the first Class. The rank and precedence of Sovereign Princes are not determined by any Conventional rule analogous to that which determines the rank and precedence of their Diplomatic Agents; but amongst Sovereign Princes entitled to Royal Honours, the custom prevails for such, as have not the title of Emperor or King, to concede precedence on all occasions to Emperors and Kings. There exist in Europe, in the present day, several Independent Princes who do not enjoy Royal Honours; such, for instance, as the Members of the Germanic Confederation below the rank of Grand Duke or Elector. These yield

[28] Vattel, Droit des Gens, L. II. § 38. Klüber, § 91.

precedence to Princes entitled to Royal Honours. There are also European States which enjoy an Independence modified by Treaties, such as Monaco and Kniphausen. Such States rank after all the States which enjoy an absolute Independence, and under the provisions of the Conventions, by which their Independence is modified, are represented for all political purposes by the Diplomatic Agents of the Protecting Power. The rules of precedence, which are observed amongst Independent Sovereign Powers, rest upon Usage and general acquiescence. The question of determining the relative rank of Independent States by a positive Compact, was taken into consideration at the Congress of Vienna; but difficulties having arisen in regard to the rank to be assigned to the Great Republics[29], the further discussion of the question was adjourned indefinitely, and the Congress limited its action to the regulation of the rank and precedence of the Diplomatic Agents of Independent States[30].

Diplomatic Agents of the Second Class.

§ 191. The second Order of Diplomatic Agents includes Envoys, Envoys Extraordinary, Ministers Ple-

29 The title of courtesy of a Great Republic, such as Venice and Genoa, was *Serenissima Respublica*. A similar title is in the present day assigned to Confederations. Thus the Germanic Confederation is addressed by the title of "the Most Serene," and Diplomatic Agents are accredited to the Most Serene Sovereign Princes and Free Cities of the Germanic Confederation. Titles of a Religious character originally conferred by the Holy See, are still used in addressing certain Sovereign Princes. Thus the titles of the Very Christian or Most Christian King, and Firstborn Son of the Church, is given to the Kings of France; the King of Spain has been styled since 1496, the Catholic King; the Kings of England, since 1591, Defenders of the Faith; the King of Poland, the Orthodox King; the King of Portugal, since 1748, the Very Faithful King; the King of Hungary, since 1758, the Apostolic King.

30 Klüber, Droit des Gens, § 94.

nipotentiary, and Internuncios[31]. Diplomatic Agents of the second Class are not clothed with the peculiar character which attaches to diplomatic Agents of the first Class, and which is derived from the dignity of the Sovereign whom they represent. Accordingly, they cannot demand *of right* a personal audience of the Sovereign to whom they are accredited. Such a Right is the distinctive privilege of a Diplomatic Agent of the first Class. In all other matters which concern him, as the Mandatary of his Nation, a diplomatic agent of the second Class does not differ in any material respect from a Diplomatic Agent of the first Class. There was a period when the *etiquette* of European Courts confined the privilege of personal intercourse with the Sovereign, at whose Court he was accredited, to an Ambassador as distinguished from an Envoy, but the usage of the present day authorises Diplomatic Agents of the second Class to confer personally on suitable occasions with the Sovereign to whom they are accredited. The privilege of personal intercourse with the Sovereign in the case of an Ambassador was not at any time considered to give to verbal conferences with the Sovereign the character of Official acts binding upon his government. International Negociations were then, as now, conducted through a Minister of Foreign Affairs, and it was through him alone that binding Official acts could be concluded by an Ambassador. In the present day the observation is still more generally applicable, as wherever the Monarchical

[31] The Austrian Internuncio at Constantinople took precedence formerly, under treaties with the Ottoman Porte, of all Ministers of the Second Order. The regulation of the Congress of Vienna is now observed by the Porte. Ch. de Martens, Guide Diplomatique, c. 10. § 65. Comte du Garden, Traité Complet de Diplomatie, L. 5. § 3.

form of Government is combined with Representative institutions, the Sovereign can only bind the Nation through the agency of a Responsible Minister[32].

Diplomatic Agents of the Third and the Fourth Class.

§ 192. The third Order of Diplomatic Agents comprises Ministers, Resident Ministers, Residents, Ministers Chargés d'Affaires. The distinction between the Minister Chargé d'Affaires, and the simple Chargé d'Affaires, who ranks in the fourth Class of diplomatic Agents, consists in the circumstance that the former is accredited by the Sovereign to the Sovereign as Minister, the title of Minister being engrafted upon that of Chargé d'Affaires[33]. Martens cites as an early example of this particular species of Diplomatic Agent, the *Minister Chargé d'Affaires* of the King of Sweden accredited to the Padischah of the Ottomans in 1784[34]. The fourth Order consists of Diplomatic Agents accredited by the Minister of Foreign Affairs to the Minister of Foreign Affairs. These are either sent out originally with express Credentials from the Minister of Foreign Affairs as Chargés d'Affaires, or have been sent out originally furnished with a Commission from the Sovereign, as Secretaries of Embassy or Secretaries of Legation; and in the latter case they are orally invested with the Charge of the Embassy or Legation by the Ambassador or Minister himself to be exercised during his absence from the seat of his mission. They are accordingly announced in this character by him before his departure to the Minister of Foreign Affairs of the Court, to which he is accredited. This fourth Order of Diplomatic Agent is not entitled to confer with the Chief of the State, but

32 Envoys as distinguished from Ambassadors, (Oratores or Legati,) are designated in Latin, *Inviati* or *Ablegati*.

33 Credentials from the Sovereign are necessary to give to the Chargé d'Affaires the character of Minister *ad interim*.

34 Précis du Droit des Gens, T. II. § 194.

only with the Minister of Foreign Affairs to whom he is accredited, and this rule is maintained in the case of Republics, as well as of Monarchical States. Wheaton cites an instance from the Archives of the United States, in which the Secretary of State for Foreign Affairs notified formally to the Chargé d'Affaires of an European Power of the highest rank, that "he could hold official intercourse only with a Department of State; that he had no right to converse with the President on matters of business, and might consider it a liberal courtesy, if he was presented to him at all."[35] *Consuls*, as such, are Commercial not Political Agents, and accordingly do not belong to any of the four orders of Diplomatic Agents, but the office of Chargé d'Affaires is sometimes combined with that of Consul-General in the same individual, who has thus the character of a Diplomatic Agent engrafted upon the Commercial character of Consul.

Resident Missions.

§ 193. Every Nation may determine for itself in what character it will accredit a Diplomatic Agent, whether it will confer upon him, by its Credentials, the full Representative character which belongs to the Ambassador or highest class of Diplomatic Agent, or will only confer upon him limited rank. But this absolute discretion upon the part of a Nation to accredit its Diplomatic Agents under any character which it may choose, is limited to occasional and temporary Missions, as distinguished from Missions personally resident at a Foreign Court. No Nation can insist as a matter of Right, that a Diplomatic Agent on its behalf shall be permanently entertained by another Nation. Grotius[36] held that Permanent Lega-

35 Elements, p. III. c. 1. § 6. The President, under the Constitution of the United States, receives Ambassadors and other public Ministers.

36 Optimo autem jure rejici

tions (assiduæ legationes) might be with right excluded by all Nations, but the practice to maintain Resident Legations at Foreign Courts had in the course of the following century become so general amongst the European Nations, that Vattel,[37] whilst holding that a Nation is not under an obligation to suffer at all times the residence of a Foreign Minister, is of opinion, that any Nation, which refuses to entertain a Resident Minister from a Foreign Power, must allege very good reasons for its conduct in this respect, if it wishes to avoid giving offence. Such reasons may arise from particular circumstances, but there are also ordinary reasons which may be always in force, such as relate to the Constitution of a Government and the State of a Nation. In the absence however of any such reason, the Usage of two centuries may now be said to justify the Nations of Europe in relying upon the Comity of one another to entertain permanently their duly accredited Diplomatic Agents. As the same Usage, however, requires in regard to Resident Missions, that Nations should accredit and receive Diplomatic Agents of equal rank, the special rank of the Diplomatic Agents to be accredited and entertained on either side must be a subject of mutual agreement between States. The practice of accrediting and entertaining Ministers of the first Class has been hitherto confined to Crowned Heads, Sovereign Princes enjoying Royal Honours, and the Great Republics. There is no rule which prevents a Nation accrediting several Diplomatic Agents of equal or unequal rank to the same Nation or the same person

possunt, quæ nunc in usu sunt legationes assiduæ, quibus quam non sit opus, docet mos antiquus, cui illæ ignoratæ.—De Jure B. et P. L. II. c. 18. § 3.

37 Droit des Gens, L. 4. § 66.

as its Diplomatic Agent to several Nations[38]. On the other hand, the same person may be accredited to the same Court by one Sovereign Prince as his Ambassador, and by another Sovereign Prince as his Envoy Extraordinary, or by both Princes as their Envoy Extraordinary. Thus the Austrian Ambassador used frequently to have separate Credentials to Foreign Courts, as Envoy Extraordinary of the Duke of Parma. The Prussian Minister in the present day has for the most part Credentials from the King of Prussia and from the Grand Duke of Saxe.

Moldavian and Wallachian Chargés d'Affaires at the Ottoman Porte.

§ 194. Agents for the private affairs of Princes, and such as have only the title of *Resident* or Counsellor of Legation or Agent, are not members of the Diplomatic Body, in other words, they do not represent their respective Nations for Political purposes, and they are not entitled to any Diplomatic privilege or immunity. To this class belong the Chargés d'Affaires of the Hospodars of Moldavia and Walachia, who reside at the Ottoman Porte, and for whom the Emperor of Russia stipulated by the sixteenth Article of the Treaty of Kutschauk Kainardii, (anno 1774[39],) that they should be treated by the Porte with kindness, and notwithstanding their little importance, should be considered as persons so far enjoying the Right of Nations, as to be safe from personal violence. This is an exceptional case founded altogether on the provisions of a special Convention, whereby the Porte agreed to restrict the exercise of its Rights of Sove-

38 It is not an unusual practice for Non-Germanic Powers to accredit one and the same Minister to divers States of the Germanic Confederation.

39 Marten's Recueil, Tom. II. p. 305. Lesquels vielleront aux affaires concernant les dites Principalités, et seront traités avec bonté de la Porte, et non obstant leur peu d'importance considerés comme personnes jouissant du Droit des Gens, c'est à dire à l'abri de toute violence.

reignty over certain of its own Subjects, whilst charged with the functions of Agent on behalf of the Hospodars at the central seat of the Ottoman Government. But this Treaty-engagement has not conferred the Diplomatic Character on these Chargés d'Affaires, nor are they received into the body of Diplomatic Agents resident at the Ottoman Porte[40].

Letters of Credence.

§ 195. A Public Minister, who is sent to represent his Sovereign at the Court of another Sovereign, ought to be expressly authorised for that purpose, and the Sovereign to whom the mission of the Minister is addressed, ought to be duly certified of his authority to present himself as the Representative of his Sovereign. Every Public Minister is accordingly furnished by the Sovereign or Chief of the State, which delegates him, with Letters of Credence, (Literæ fidei sive credentiales,) which are addressed to the Sovereign or Chief of the State in the case of States which are under a permanent Sovereign or chief Magistrate; but in the case of Unions or Confederations of States, which are for the most part under a temporary President, the letters of Credence are addressed to the States themselves. The reason for this distinction of practice in the case of Unions or Confederations of States is to be found in the circumstance, that as the President of an Union or Confederation is a temporary Officer, if the Credentials of Foreign Min-

[40] These Chargés d'Affaires are properly speaking Agents for the affairs of the Principalities, transacting business with the Home Department at Constantinople. It has been the practice in the Ottoman Empire for the Governors of Provinces to be represented at the Central Seat of Administration by an Agent, (termed in the Turkish language, Kayson Kehagasi,) and as the lives of such agents were always in jeopardy, if a political crisis arose, a stipulation for the safe conduct of the Agents of the two Principalities was introduced into the Treaty of Kainardji.

isters were addressed to him, they would have to be renewed as often as a new President was appointed, and serious prejudice to both Nations might result from the frequent interruption of Diplomatic intercourse.

The Letters of Credence set forth the name and special character of the Diplomatic Agent, and the general object of his Mission, and request that he may be received with favour, and have full faith given to what he says on behalf of his Sovereign. They are invariably sealed up, and were formerly secured with silken cord as well as with wax. The modern practice is to enclose the Letters in a sealed envelope. Their form varies with the usage of each Nation. They are for the most part in the form of a Cabinet Letter, (*Lettre de Cabinet*,) written in the first person and addressed by the Sovereign, who accredits the Minister, to the Sovereign to whom he is accredited, commencing with "My dear Brother" or "My dear Sister," and ending with an affectionate subscription and signature under the hand of the Sovereign. These Letters are sometimes styled *Lettres de Cachet*, being sealed up with the *Cachet* seal[41], which is the smallest seal of the Minister of Foreign Affairs. The Letters of Credence of some Sovereigns, as for instance of the Kings of Prussia and Denmark, are countersigned by the Minister of Foreign Affairs. It is not however the practice in Great Britain for the Minister of Foreign Affairs to countersign Letters of Credence furnished to British Diplomatic Agents. In cases where a more formal ceremony is intended to be observed, the Letters of Credence are in the form of a *Lettre de Chancellerie*, which is drawn up in the third person, and

[41] When they are enclosed in an envelope, the envelope is sealed up with the *Cachet* Seal.

in which all the titles of both Sovereigns or both States are set forth at length. A *Lettre de Chancellerie* is generally used when a Sovereign Prince accredits a Diplomatic Agent to a Republic or a Confederation of States, or when a Christian Power accredits a Public Minister to a Mahommedan Prince. Thus Great Britain accredits her Ministers to the United States of America, and to the Emperor of Morocco, in a *Lettre de Chancellerie*, whilst she accredits her Ambassador to the Emperor of Austria in a *Lettre de Cabinet*. The *Lettre de Chancellerie* is written upon a sheet of foolscap paper, and in the case of British Credentials, it bears upon its face the impression of the small signet of the Foreign Secretary stamped upon a wafer[42]. Great Britain has, of late, set examples to other States of simplifying, as much as possible, the Ceremonial of Credentials, but several of the great European Powers, Russia for instance, still continue to employ the *Lettre de Chancellerie* for the Credentials of her Diplomatic Agents of the three first Orders. In the case of a Diplomatic Agent of the fourth Order, his Letters of Credence are addressed by the Chief of the Department of Foreign Affairs in his own country, to the Chief of the corresponding Department in the country to which he is accredited. Where a Foreign Minister is accredited to an Emperor or a King, it is usual to furnish him with Letters of Credence of identical import, *mutatis mutandis*, addressed to the Consort of the King, if she has the title and rank of Empress or

[42] The British Foreign Secretary has three Seals, a small Cachet Seal for wax, used for *Lettres de Cabinet*, an intermediate seal for wafers, called the small Signet, for *Lettres de Chancellerie*, and a large seal for wafers, called the large Signet, for the Commissions of Secretaries of Embassy or Legation, and of Consuls.

Queen[43]; but if he is accredited to a reigning Empress or Queen, it is not usual to furnish him with additional Letters of Credence addressed to the Prince Consort. It would appear to be the practice of some Governments to furnish their Public Ministers with *Letters of Recommendation* in addition to their *Letters of Credence*, addressed by the Sovereign himself, or by his Minister of Foreign Affairs, to distinguished public Functionaries, or to Members of the Government of the State to which the Ministers are accredited. Of this kind were the Letters of Recommendation, with which the Foreign Ministers, accredited by the Christian Powers of Europe to the Ottoman Porte, were formerly furnished, and which were addressed to the Grand Vizier and to the Reis Effendi, in other words to the Ottoman Prime Minister and to the Ottoman Secretary for Foreign Affairs. The practice of furnishing their Diplomatic Agents, who are accredited to the Porte, with Letters of Recommendation, is still observed by some of the European Powers, but Great Britain has discontinued them, and she furnishes her Ambassador to the Porte in the present day only with Letters of Credence, drawn up in the form of a *Lettre de Cabinet*, and addressed by the Sovereign in the first person to the Padischah. Great Britain, in so modifying her practice, has been careful to treat the Padischah of the Ottomans with the same degree of respect which she

Letters of Recommendation.

43 In States where Morganatic marriages, or marriages of the Left Hand are recognised as lawful varieties of the matrimonial contract, the wife of the Emperor or King does not necessarily bear the title and rank of Empress or Queen, unless that title and rank have been directly conferred upon her. Thus Frederick IV. of Denmark, contracted a left-handed marriage with a noble Danish Lady during the lifetime of his first Queen, and upon the death of the Queen, the King elevated his left-handed wife to the dignity of Queen.

shows to the Emperor of all the Russias. The Padischah, on the other hand, accredits his Ambassador to Great Britain in a *Lettre de Chancellerie*, to which his Autograph Signature is subscribed, and upon which the mark of a Cachet seal is impressed in ink. It would thus appear that Reciprocity between Nations is not required in the ceremonial of accrediting their Diplomatic Agents. Each Nation has its own practice, and whenever a simplification of form has been adopted by any Nation, such simplification has been held not to imply any diminution of respect towards the Sovereign to whom the Letters of Credence are addressed.

The Letters of Credence are the document which the Public Minister presents upon his formal reception by the Sovereign to whom he is accredited, but he cannot require to be solemnly received for the purpose of presenting his Credentials before he has delivered an authentic copy of them to the Minister or Secretary of State for Foreign Affairs, in order that he may satisfy himself that they are fit and proper Letters for his Sovereign to receive. Letters of Credence addressed to a Sovereign Prince must be presented of Right to the Sovereign himself even during his minority, and although the Government of the State is entrusted to a Regent. Such was the practice in France during the minority of Louis XV. and the Regency of the Duke of Orleans, and such was in very recent time the practice observed in Spain[44] during the minority of Queen Maria Isabella and the Regency of the Duke of Vittoria. Letters of Credence expire upon the demise either of the Chief of the State by whom they were furnished, or of the Chief of the State to whom they are addressed.

44 Ch. de Martens, Guide Diplomatique, Tom. I. § 18.

Fresh Letters of Credence must be presented, if a Public Minister be promoted by his Sovereign from a lower to a higher Order, as for instance, if he should be raised from the rank of Envoy Extraordinary and Minister Plenipotentiary to that of Ambassador.

§ 196. Although the Letters of Credence, which are presented by a Diplomatic Agent accredited to reside at a Foreign Court, imply General Full Powers on his part to transact all political business on behalf of his Constituent, it is usual nevertheless, if any Special Treaty or Convention is to be negociated, to furnish the Diplomatic Agent with a Mandate or Instrument of Full Powers to negociate and conclude the particular Treaty or Convention. The Mandate (Mandatum Procuratorium), or, as it is commonly termed, the Full Powers (les pleins pouvoirs), are always set forth in Letters Patent of the Sovereign, which are signed and sealed according to the form which prevails in each State in regard to Letters Patent. The full Powers granted by European Sovereigns are for the most part signed by the Sovereign, and countersigned by the Minister or Secretary of State for Foreign Affairs. Full Powers.

A Mandate of Full Powers may be a Mandate *ad hoc*, limited to the particular business of the negociation or treaty (pouvoirs spéciaux,) or it may be a Mandate to treat generally with the Ministers of all Powers and States within the dominion of the Sovereign to whom the Minister is accredited (pouvoirs généraux), or it may extend still further, and may be a Mandate to treat with all Powers or States (pouvoirs illimités). Limited Full Powers are generally given to a Diplomatic Agent where the object of the negociation is a particular treaty with a particular Power. General Full Powers on the other hand are

given, whenever there is a Congress of Ministers Plenipotentiary nominated by various States, and when it may be uncertain what Powers or States may take part in the Congress. Unlimited Full Powers are more rare, and are only given when it is uncertain not only what Powers and States may take part in a Congress, but where such Congress may be held or adjourned to, and what matters may come under discussion and negociation. Thus unlimited Full Powers were given by the Queen of England to the British Diplomatic Agents, who concluded the negociations on behalf of the British Crown at the Congress of Paris in 1856. M. de Garden[45] says correctly that such Full Powers are extremely rare. Publicists seem to speak of such Full Powers as not in use in the present day. Thus Ch. de Martens[46] says, "Il n'est plus d'usage de munir un Ministre du Plein Pouvoir, qui l'autorisait à traiter avec toutes les Puissances, et que l'on appelait 'actus ad omnes populos.'" Dr. Phillimore,[47] on the other hand, construes this Latin phrase as equivalent to "Letters accrediting the bearer to all Courts." If this interpretation be correct, there is no doubt that such Letters of Credence are not in present use, but it seems doubtful from the instances cited by Ch. de Martens whether the Latin phrase is to be interpreted in such a sense, inasmuch as Ch. de Martens alludes, in illustration of his remark upon the disuse of such Full Powers, to a Full Power granted by Queen Anne of England to her Secretary d'Ayrest, then British Resident at the Hague, whereby he was authorised to treat with the Ministers of all Princes and States interested in the negociations of the Peace of Utrecht[48]. Such a Full

45 Traité Complet de Diplomatie, T. II. p. 48.

46 Guide Diplomatique, I. c. 4. § 19.

47 Commentaries, XI. § 230.

48 Lamberty, Mémoires, T. VIII. p. 742.

Power is evidently not more extensive than the Full Powers which are in use, when occasion requires them, in the present day, and which are quite distinct from Roving Letters of Credence. Thus Full Powers were given by the First Consul Napoleon to General Augereau to make peace with the Sovereign Princes of Germany, and to treat with the States of the Germanic Empire. By virtue of such Full Powers General Augereau entered into separate negociations and concluded separate Treaties with individual Princes and States of that Empire, according as he found any of them favourably disposed to his proposals of Alliance or of Neutrality.[49]

Instructions.

§ 197. Every Diplomatic Agent is furnished by his own Government with Instructions as to the object of his Mission and for the guidance of his conduct. These Instructions are sometimes given orally, but more generally in writing, so that the Agent may be able to refer to them from time to time as occasion may require. The Instructions, being for his own guidance, ought to be kept secret by him, unless he is expressly authorised by his Government to communicate them in part, or *in extenso*. The duty of every Diplomatic Agent is to conform his conduct to his Instructions, unless it should happen from unforeseen circumstances, that a strict compliance with them would defeat the object of his Mission, or otherwise lead to consequences prejudicial to the interest of his Constituent. Under such circumstances it may become his duty to suspend the execution of his Instructions, or even to deviate from them, provided he does not engage his Government to any measure opposed to its general Policy or conflicting with the

49 Conventions entre la République Française et divers Princes d'Allemagne (14 Sept^br., 1800.) Martens, Recueil, VII. p. 112.

special object of the Negociations, with which he has been instructed. If questions should arise upon which a Public Minister is without Instructions, it is his duty to refer them to his Government, in other words to entertain all propositions or overtures *ad referendum*. If the case is urgent, and the time does not admit of referring to his Government for Instructions, it is his duty either to reject all overtures absolutely, or, if he entertains them, to accept them explicitly *sub spe rati*. This latter form, however, has now nearly passed out of use, since there is for the most part an express provision in every Treaty which is concluded by Diplomatic Agents, that the Ratifications of the Contracting Powers shall be exchanged within a certain number of days, it being thereby implied that the Treaty-Engagements do not acquire full force and effect, unless sanctioned by the Ratifications of the Parties upon whom the fulfilment of their provisions will devolve.

The practice of inserting in the body of a Treaty a provision as to Ratification has been adopted *ex majori cautela* to prevent any dispute as to the necessity of Ratification, as Publicists are by no means of accord on this subject. Grotius[50] and Puffendorf[51] hold, that the act of a Diplomatic Agent, if it is within the scope of his Full Powers, binds his Constituent absolutely upon the analogy of the Roman Law as to the Contract of *Mandatum*. Their doctrine is upheld by Vattel[52] and Klüber[53]. Bynkershoek[54], on the other

50 De Jure B. et P. L. II. c. 11. § 12.

51 Law of Nature and of Nations, L. III. c. 9. § 2.

52 Droit des Gens, L. II. c. 12. § 156.

53 Droit des Gens, Partie II. T. II. § 142.

54 Mandata illa Generalia, ut nunc sunt Gentium mores, nihil fere, ut dixi, præbent, quam potestatem agendi, minime vero agendi ex arbitrio contra ipsa Principis mandata secretiora. Quæst. Jur. Publici, L. II. c. 7.

hand, maintains that the Usage of Nations requires a Ratification from the Sovereign in order to give validity to a treaty concluded by his Minister in every instance, except in the very rare case where the entire Instructions are contained in Special Full Powers, and that the analogy of the Roman Law is not to be considered an unerring guide in this matter, as the Practice of Nations has intervened and has excepted International Compacts in this respect from the Rules of Civil Jurisprudence. The reason of this apparent anomaly of a Constituent not being bound by the act of a duly authorised Agent, will be more fully discussed in the next following chapter upon the Right of Treaties: it may be sufficient for the present moment to observe, that for the sake of the business itself of negociating successfully, it has become the Practice of Nations to give as extensive and general Full Powers as possible to Diplomatic Agents, even to the extent of a promise to ratify, in order that they may be able to do and to agree to all that their Constituents could do or agree to. The exercise, however, of these Powers is in practice understood to be regulated by Secret Instructions under the further control of Non-Ratification. The Non-Ratification of Preliminaries under the circumstances of such large Powers is not considered to involve any breach of the Law of Nations.

Ceremonial of Reception.

§ 198. The Ceremonial to be observed in the reception of a Foreign Minister at the Court to which he is accredited has undergone great modifications within recent times. It was one of the regulations which were adopted by the Congress of Vienna, (anno 1815,) that an uniform mode of reception for Diplomatic Agents of each class should be established in each State; and although this provision has not been

literally carried into execution, the practice of Nations has conformed itself to the spirit of it. Whatever be the rank or class of a Public Minister, it is his first duty to notify his arrival immediately to the Minister or Secretary of State for Foreign affairs of the Sovereign to whom he is accredited. In the case of an Ambassador, as distinguished from a Diplomatic Agent of the second Class, it was formerly the practice for him to make a *Solemn Entry* into the city, which was the residence of the Sovereign or the seat of his Government. This ceremony may now be regarded as fallen into general desuetude, as far as regards the mutual intercourse of the Christian Powers of Europe. The *Solemn Entry* was part of the pageant, which terminated in a *Public Audience*, in which the Ambassador presented his Letters of Credence to the Sovereign in person. Ambassadors, as distinguished from Ministers of the Second Class, have always been entitled to demand a *Public Audience* of the Sovereign, but the *Solemn Entry* appears to have been a Ceremony which was within the discretion of the Sovereign, who receives the Embassy, to accord or not at his pleasure; and we find accordingly, that both the Holy See and the Ottoman Porte had special rules of practice, under which the Solemn Entry was granted only to the Ambassadors of particular Nations.

With regard to the Public Audience, which is granted to Ambassadors and Nuncios on their arrival, and sometimes on their departure, the same Ceremony is observed to all alike. The Introducer of Ambassadors, or the Master of the Ceremonies, proceeds in a State carriage of the Sovereign drawn by six horses to the Hotel of the Ambassador, and conveys him to the Palace of the Sovereign, where he is received in

the presence of the great Officers of the Court, with the same honours which would be paid to the Sovereign, if present, whom he represents. The Ambassador then reads a Speech of Audience in which he refers to his Letters of Credence, which he thereupon takes from the hands of his Secretary of Embassy, who attends him on such occasions, and presents to the Sovereign, who hands them to the Minister or Secretary of State for Foreign Affairs. The Sovereign then reads an answer to the speech of the Ambassador, who thereupon retires from the presence of the Sovereign with the same forms with which he entered the Presence-Chamber. The Ceremony of a Public Audience has of late been frequently dispensed with at the Court of St. James' on occasions of the reception of an Ambassador from an European Sovereign, and on such occasions a Private Audience has been substituted of a similar kind to that which is accorded to a Foreign Minister of the second or third class. Such an audience, however, is not altogether free from Ceremony. The Sovereign receives the Ambassador in the presence of the Minister or Secretary of State for Foreign Affairs, and the Introducer of Ambassadors, or the Master of the Ceremonies, attends to present in due form the Ambassador, who makes a short speech explanatory of his Mission, and having presented his Letters of Credence to the Sovereign, retires.

The Sacred Character of an Ambassador.

§ 199. It being necessary that Nations should treat and hold intercourse with one another in order to adjust disputes and maintain relations of amity, and it being impossible for a Nation collectively to treat with another Nation, there results a necessity for Nations to delegate Agents on their behalf, and to furnish them with full Powers to negociate and settle

the matters which may be at issue. The Right of Embassy being thus established, the inviolability of the person of the Ambassador is a necessary consequence; for if the person of the Ambassador is not secure from violence of every kind, the Right of Embassy becomes precarious and the channels of International Reconciliation will be closed. Vattel[55] accordingly derives the independence and inviolability of the Ambassadorial character from the *Natural* and *Necessary* principles of the Law of Nations. This attribute of inviolability is so absolute, that the person of an Ambassador is held to be *sacred*. "Sanctum inter gentes jus legationum, sancta corpora legatorum."[56] Bynkershoek[57] accounts for the peculiar sacredness of the person of the Ambassador on the ground that an Ambassador represents his Sovereign, and that he is the Minister of peace and alliance, and that without his agency the Society and Repose of Nations could not be maintained.

His Extra-territoriality.

§ 200. The inviolability of the person of an Ambassador entails, as a necessary incident, his entire exemption from the Territorial Jurisdiction of the Sovereign to whom he is accredited. This exemption, which applies to the civil as well as the criminal law of the Territory, is founded upon considerations not of mere convenience but of necessity; for an Ambassador ought to be protected from every kind of compulsion, as well from that which relates to things necessary to him, as from that which touches his person, in order that his security may be complete[58]. The fiction of Extra-territoriality has been

55 Droit des Gens, L. VII. § 81, 103. Klüber, § 103. Hefter, § 205.

56 Grotius de Jure Belli et Pacis, L. I. c. 18. § 1.

57 De Foro Legatorum, c. 5.

58 Nam omnis coactio abesse a legato debet, tam quæ res ei

accordingly introduced with a view to express in the most forcible manner the completeness of this exemption. According to this fiction the Public Minister, although *de facto* resident in a foreign country, is regarded as *de jure* resident within the territory of the Nation which he represents, and he continues to be subject to the Laws of his own country in all matters which concern his Personal *Status* and Property[59].

The Right of Personal Inviolability attaches to a Public Minister from the time when he enters the territory of the State to which he is accredited, if notice of his Mission has been previously communicated to it, to the time when he quits the territory, although war should have actually broken out between his own Nation and the State to which he is accredited before he has taken his departure. The Ottoman Porte in this respect has conformed its practice to that of the Christian Powers of Europe. It was formerly the rule of the Porte, if war broke out between it and a Christian Power, to imprison the Diplomatic Agent of that Power in the Castle called the Seven Towers, until peace was reestablished. The Porte first waived this practice when the war broke out with Russia, which was terminated by the peace of Bucharest (28 May, 1812). In the course of the conferences which preceded the departure of the Ambassadors of France, Great Britain and Russia,

necessarias, quam quæ personam tangit, quo plena ei sit securitas. Grotius De Jure Belli et Pacis, L. II. c. 18. § 9.

59 Quare omnino ita censeo, placuisse gentibus ut communis mos, qui quemvis in alieno territorio existentem ejus loci territorio subjicit, exceptionem patetur in legatis, ut qui sicut fictione quadam habentur pro personis mittentium, ita etiam fictione simili constituerentur quasi extra territorium; unde et civili jure populi, apud quem vivunt, non tenentur. Grotius de Jure Belli et Pacis, L. II. c. 18. § 4, 5.

in the year 1827, the Porte formally declared to the Ministers of Austria and Prussia that the Seven Towers no longer existed[60].

Extra-territoriality of the Ambassador's Hotel, and of his Suite.

§ 201. The same reasons which warrant the Independence and Personal Inviolability of an Ambassador, concur likewise in securing the sanctity of his abode. The general consent of Nations has accordingly extended in practice the fiction of *Extra-territoriality* to the Hotel of the Ambassador; which is not merely protected by the positive Law of Nations from all lawless outrage, but is inaccessible to the ordinary officers of Justice or of Revenue[61]. The Extra-territoriality of the Ambassador's Hotel is however not so absolute as to constitute it an asylum for others than those, who form the suite of the Ambassador himself. Bynkershoek[62] has discussed the Right of Asylum for all who take refuge in the Hotel of an Ambassador, which Grotius[63] has pronounced to be a privilege depending upon the concession of the State wherein the Ambassador resides, and not to be a part of the Law of Nations; and Bynkershoek has correctly pointed out, that all the privileges of Ambassadors have one and the same object in view; namely, to enable them to discharge the duties of their office without impediment or restraint; and that it is not necessary for the discharge of their duties that they should afford shelter from justice to third parties, who are not connected with the end and objects of the Mission. The limits, within which an Ambassador may claim the privilege of Extra-territoriality, in regard to his own *Personal Suite*, are

60 Ch. de Martens, Guide Diplomatique, § 23.

61 Vattel, Droit des Gens, L. IV. c. 9. § 117.

62 Bynkershoek, De Foro Legatorum, c. 21.

63 Grotius, De Jure Belli et Pacis, L. II. c. 18. § 8.

within the discretion of the Ambassador, the privilege in regard to his own Personal Suite being granted for the convenience of the Ambassador himself; but an Ambassador cannot waive, at his discretion, the privilege of extra-territoriality in regard to any members of his *Official Suite;* that is, of any officer of his Household appointed by the Sovereign himself. The Chief of the State alone may waive the privilege of Extra-territoriality on behalf of the Ambassador and the *personnel* of the Embassy. It is not even competent for any of these individuals to waive at their own pleasure this privilege[64], for it is not their personal privilege, but the privilege of the Independent State or Nation which they represent. Difficulties have occasionally arisen, from persons claiming without sufficient warranty, to belong to the Suite of a foreign Minister, and the usage of most Nations now requires, that an official list of all the members of the suite of a Foreign Minister shall be transmitted to the Minister or Secretary of State for Foreign Affairs at fixed periods[65].

The Ambassador's Jurisdiction over the *personnel* of the Embassy.

§ 202. It follows from the principle of Extra-territoriality, that a Foreign Minister is at liberty to exercise Criminal and Civil jurisdiction over the *personnel* of the Embassy, if he be so empowered by his own Nation. It rests accordingly with the discretion of the Sovereign Power, which accredits an Ambassador, to invest him with such Jurisdiction. It is customary in Civil matters for a Foreign Minister to be invested with, and to exercise, jurisdiction in all questions which may arise amongst the members of his *Official Suite*, or between them and the citizens or subjects of

64 Vattel, L. IV. c. 8. § 3. Bynkershoek, De Foro Legatorum, c. 23.

65 Wheaton's Elements, Part III. c. 1. § 16. Phillimore's Commentaries, T. II. § 188.

the country to which he is accredited; but it is not the usage for him to exercise jurisdiction in criminal matters, over any person officially attached to the Embassy further than by arresting the offender and sending him for trial back to his own country. In the case of his own *Personal Suite*, a Foreign Minister may, if he pleases, upon complaint made to him, dismiss any individual from his service, and so withdraw from him the protection to which he would be entitled under the Law of Nations, if he continued in his service.

Liability of an Ambassador to the payment of Local dues.

§ 203. There are some exceptions to the privilege of Extra-territoriality as applied to the Hotel of an Ambassador. A Foreign Minister is privileged from being called upon to contribute personally to the General Taxes of a Country; that is, to such Taxes as are levied by the Government, and which are available for the General purposes of the State, in which the Ambassador is not interested. But a Foreign Minister is not exempt from the payment of Local dues, which are raised for purposes of Local administration, and which are expended on Local objects, from which he himself, in common with his neighbours, derives immediate benefit. Thus he is liable to pay the Local Rates[66] assessed upon his Hotel, or its site, for sewerage, lighting, watching, and similar objects. He is also liable to pay tolls for the use of roads and bridges, and also for the carriage

[66] This liability has been sometimes disputed, and Klüber holds it to be doubtful, whether such Rates can be rightfully exacted, if the Ambassador is unwilling to pay them. Wheaton considers the Ambassador's Hotel to be subject to taxation, in common with the other Real Property of the Country. A practical difficulty will always be found in levying them, as the Person and Property of the Ambassador is exempt from the Jurisdiction of the Civil Tribunals, which must be appealed to in order to enforce payment in the last resort.

of his letters, if they are conveyed to him by the Local Post; and as he is at liberty at all times, if he pleases, to send his letters by a privileged Courier, it is therefore optional for him to employ the services of the Local Post, and if he employs it, he derives immediate advantage therefrom[67].

Liberty of Religious Worship.

§ 204. Another and more important exception to the privilege of Extra-territoriality, is found in the exercise of Religious Worship (Culte Réligieux) in the Hotel of an Ambassador. A Foreign Minister has not the right of maintaining a Chapel and a Chaplain within his Hotel, under the Law of Nations[68]; and accordingly, we find the liberty of Religious Worship for the Ambassador and his Suite, made a matter of Treaty-engagement between the Roman Catholic and Protestant Powers of Europe, subsequently to the Reformation; and between the Christian and Mahommedan Powers at all times since Diplomatic intercourse was established between them. There are some countries in which, under the Territorial Law, all forms of Religious Worship are permitted, in which case no Treaties are required: there are others, in which one form of Religious Worship is established, and none other is tolerated. In such cases it has been usual to stipulate by Treaty for the free exercise of Religious Worship, on behalf of the members of the Embassy and the Suite of the Ambassador within the Hotel of the Embassy. It has been an invariable rule to concede this privilege, whenever there has been no public place of Religious Worship at the seat of the Embassy, which its members could attend, as being in accordance with their Religious Creed; or wherever there has not been

67 Ch. de Martens, Guide Diplomatique, § 109.
68 Martens, Précis, § 222.

within the Hotel of another Ambassador accredited to the same Court a Chapel, in which such Religious Worship has been already permitted. Thus, as soon as the Emperor Joseph II had granted liberty of Religious Worship to the Protestants of the Confession of Augsburg resident in Vienna, he insisted upon the discontinuance of Religious Worship in the Chapels of the Legations of the Protestant Princes of the Germanic Empire[69]. Grotius is altogether silent on this subject, but his silence has not any significance, seeing that in his day a Resident Embassy (Assidua Legatio) was altogether a novelty, and it had not any warrant of ancient Custom[70]. At the time, however, when Vattel wrote his work on the Law of Nations, the free exercise of Religion was a privilege allowed to a Foreign Minister in almost every country. Vattel speaks of it as resting on established Custom[71], "It is indeed highly proper," he says, "that a Minister, and especially a Resident Minister, should enjoy the free exercise of his Religion within his own house, for himself and his *Suite*. But it cannot be said that this Right, like those of Independence and Inviolability, is absolutely necessary for the success of his Mission, particularly in the case of a temporary Minister, the only one whom Nations are bound to admit. The Minister may in this respect do what he pleases in his own house, into which nobody has a right to pry or to enter. But if the Sovereign of the Country, where he resides, should for substantial reasons refuse him permission to practise his Religion in any manner which might render

69 Klüber, Droit des Gens, § 215. Ch. de Martens, Guide Diplomatique, § 35.

70 Grotius, De Jure Belli et Pacis, L. II. c. 18. § 3, 2.

71 Vattel, Droit des Gens, L. IV. § 104.

it an object of Public notice, we must not presume to condemn the conduct of that Sovereign, much less to accuse him of violating the Law of Nations. Ambassadors are not debarred at present from the free exercise of their Religion in any civilised country; for a privilege which is founded on Reason, cannot be refused when it is not attended with any evil consequences." The practice of Nations since the time of Vattel has become still more courteous[72], and has gradually extended the privilege of Religious Worship to the establishment of public Chapels, attached to the several foreign Embassies; so that although the privilege of a Chapel within the Hotel of the Ambassador is a matter of Comity, and not of strict Right, still the custom of permitting it has become so universal, that to refuse such permission in the present day would be little less discourteous, than to refuse to permit the continuous Residence of the Ambassador himself. The privilege of a Chapel, however, does not extend to the use of bells, or to any public processions or ceremonies outside the walls of the Chapel.

Inviolability of an Ambassador passing through the territory of a third Power.

§ 205. Jurists are divided in opinion upon the question whether an Ambassador is by the Law of Nations entitled of Right to Safe Conduct whilst passing through the territory of a third Power, on his way to or from the territory of the Nation to which he is accredited. Grotius[73] does not expressly determine this question, when he says, that "the law respecting the Inviolability of Ambassadors is to be understood as binding upon the Nation to whom the Embassy is sent, more particularly if it has received the Embassy, as from

72 Ch. de Martens, Guide Diplomatique, § 35. Wheaton's Elements, Part III. c. 1. § 21.

73 Grotius, De Jure Belli et Pacis, L. II. c. 18. § 5.

that time a tacit Compact may be considered to have been introduced." Bynkershoek, on the other hand, holds in terms, that the privilege of the Ambassadorial Character is only operative within the State to which he is accredited, and he cites in support of his view the opinions of Gentilis, Zouch, Huber, and Wicquefort. Bynkershoek[74] admits however that the opinions of the more ancient writers upon the Rights of Ambassadors were in a contrary sense. Vattel, on the other hand, draws a distinction between the enjoyment of all the Rights annexed to the Diplomatic Character, and the enjoyment of Personal Inviolability. It must be borne in mind, that many of the Rights now recognised as incident to the Right of Embassy, have only been so recognised, since the practice of accrediting Resident Ambassadors has given occasion for their recognition. "It is true," says Vattel[75], "that the Prince alone to whom the Minister is sent is obliged and specially engaged to secure to him the enjoyment of all the Rights attached to his Character; but the others, over whose territory he passes, cannot refuse to him that to which the Minister of a Sovereign is entitled, and which Nations owe reciprocally to one another. They owe to him above all things perfect Personal Security. To insult him would be to injure his Master and the whole Nation to which he belongs: to arrest him and offer violence to him would be to impair the Right of Embassy, which appertains to all Sovereigns." Merlin[76], Klüber[77], Ch. de Martens[78] and Wheaton[79], support Vattel's opinion,

74 Bynkershoek, de Foro Legatorum, c. 9. § 7.

75 Droit des Gens, L. IV. c. 8. § 84.

76 Répertoire, tit. Ministre Publique, Sect. V. § 3.

77 Droit des Gens, 204.

78 Guide Diplomatique. § 36.

79 Elements, Part III. § 20.

and Merlin disputes with good reason the interpretation, which Bynkershoek has assigned to the word *passerende*, which occurs in an Edict of the States General (anno 1679) issued on the occasion of the Negociations for the peace of Nimeguen. The Edict announced that the persons, domestics, and effects of foreign Ambassadors or Ministers, "*hier te lande komende, residerende, of passerende*," should be exempted from arrest. Bynkershoek considers this Edict as having reference only to foreign Ministers accredited to the States General, and construes the word *passerende* as referring not to those who might have landed in the territory of the States General, and were *passing through* it on their way to the territory of a third Power, but to those who were about to leave the territory of the States General, having been accredited to them as Resident Ministers. "Non interpretor," are his words, "de legatis transeuntibus, sed abeuntibus." Merlin in reviewing Bynkershoek's interpretation maintains, that *passerende*, being the Dutch equivalent of the French word *passer*, is applicable only to a person who, having arrived at a place, proceeds onward to another place, and is never used to designate a person who is leaving a place where he has been residing, and going back to the place from which he first came. Merlin however very justly remarks, that when it is said that an Ambassador is entitled to have his Independence respected in every territory through which he passes, it must be understood that he travels under the avowed character of an Ambassador; in other words, that his passport certifies his Public Character. If an Ambassador, who is *in itinere*, presents such a pasport at the frontier of a State other than to which he is accredited, and is thereupon allowed to enter its territory, the good

faith of the Sovereign of that State becomes pledged to respect his Official Character, as long as he does nothing inconsistent with perfect good faith on his own part. A Nation is at liberty to refuse a passage through its territory to a foreign Minister accredited to a third Power, precisely as a Nation is entitled to refuse altogether to receive a foreign Minister accredited to itself, but, if it allows him upon knowledge of his Character to enter its territory, it may not maltreat him nor suffer any violence to be offered to his Person.

The reasons assigned by Bynkershoek for restricting the privilege of the Ambassadorial Character are thus stated, "quia illa privilegia voluntatis tacitæ sunt post admissum legatum, et legatum etiam repellere licet, neque legatio inter alios, quam qui misit et ad quem mittitur, versatur." On examining these reasons, it will be found that the principle involved in the first reason does not militate against Vattel's view, if the Ambassador travels with a passport which certifies his Official Character, as every State through whose territory he proposes to pass is at liberty to decline to admit him in such Character, and his admission is thus a Voluntary act upon its part; on the other hand, the second reason, whilst it may be a valid reason so far as Resident Embassies and the secondary rights of Embassy incidental to Residence are concerned, is inconsistent with the fact that the person of the Courier who is the bearer of the despatches of a Foreign Minister is sacred under the Law of Nations, whilst he is passing through the territory of a Power to whom the Minister is not accredited, if the Official Character of the Courier is certified by his passport. The Right of Innocent Passage, in regard to an Ambassador on his way to the Court to which

he is accredited, is a Right in which all Nations are interested. It may be said of the disputes of Nations as of individuals, "Rei Publicæ interest ut finis sit litium." It is in the common interest of Nations that the peace of the World should be maintained, and the Personal Inviolability of the Ambassador, whose Mission is essentially that of Peace, is as necessary for that end, when he is passing on his way to his destination, as when he has reached his post. Vattel[80] holds that Francis I of France was justified not merely in declaring war against the Emperor Charles V, by reason of the murder of his Ambassadors, accredited respectively to Constantinople and to Venice, whilst passing through the Duchy of Milan, but in calling in the aid of other Nations, since it was not a Private Right of a particular Nation which was in dispute, but a matter which involved the Right of all Nations, since they are all interested in maintaining the Sacred Right of Embassy and of those means which enable them to hold communication with each other and to treat of their Commercial interests[81]. Wheaton, who, as already observed, supports the views of Vattel and Merlin, remarks, that the Inviolability of a public Minister in his passage through the territory of a third Power depends upon the same principle which protects the person of his Sovereign coming into the territory of a friendly State by the permission,

[80] Droit des Gens, L. IV. c. 7. § 84.

[81] The cases of the Duc de Belle Isle, Ambassador of France to Prussia, arrested in Hanover on his way to Berlin, and of the Marquis de Monti, Ambassador from France to Poland, arrested in Dantzig on his way back to France, which are sometimes quoted as examples of the practice of Nations in accordance with Bynkershoek's view, will be found on examination to be instances of enforcing a strict Right of War. The details of each case will be found in the collection of Causes Celèbres du droit des Gens, par Ch. de Martens, Tom. I. pp. 210, 285.

express or implied, of the local Government. Both are equally entitled to the protection of that Government against every act of violence and every species of restraint inconsistent with their Sacred Character. "We have used," says Wheaton, "the term *permission, express or implied*, because the public minister of a Sovereign Prince accredited to one country, who enters the territory of another country making known his Official Character in the usual manner, is as much entitled to avail himself of the permission, which is implied by the absence of any prohibition, as the Sovereign himself in a similar case[82]."

Consuls not Diplomatic Agents.

§ 206. The Institution of Public Consulates in Foreign Countries (Consulats à l'Etranger) dates from the Sixteenth Century, although the name of *Consul*, as applied to an Officer exercising jurisdiction in Commercial matters, was in familiar use in the cities of the Mediterranean and in the Hanse Towns since the Thirteenth Century[83]. The Judge Consul was originally a local Officer annually elected in each great City of Maritime Commerce by the members of the Mercantile Community established therein. It was his province to determine all disputes between the members of that Community and foreign merchants in matters of Commerce and Navigation. These Officers were for the most part two in number, and the *Consolato del Mare*, one of the earliest compilations of Rules for the decision of Maritime and Commercial questions, is considered to have been so called, as embodying the Rules according to which the Judge-Consuls, established in the Maritime Cities of Spain, proceeded in determining the questions submitted to

[82] Elements, Pt. III. § 20. Bynkershoek, de Foro Legatorum, c. 3, 9.

[83] The office of Judge Consul was first introduced at Barcelona in Spain in the year 1279.

their decision. As Commerce increased, these Local Institutions became inadequate to the wants of Merchants of different Nationalities, and we thus find the Institution of Judge Consuls fall into disuse, and their functions pass into the hands of Officers bearing indeed the name of Consuls, but appointed not by the resident body of merchants in each City, but by Foreign States, and commissioned by them to watch over the Commercial interests of their subjects. The duties of a Consul in the modern sense of the word are strictly limited to the management of the private affairs of the subjects or citizens of the State, from which he has received his Commission. He is not concerned in any way, as Consul, with the public affairs of States, and he is accordingly not clothed with a Diplomatic Character. J. J. Moser is almost the only Jurist of note who has claimed for the Consul a place of inferior rank amongst Public Ministers; but Bynkershoek, Wicquefort, Vattel, and Klüber concur in rejecting such a claim. It is true, that European Consuls accredited to Mahommedan Powers have in fact exercised many of the functions which mark the Diplomatic Agent, and have been clothed with many of the attributes of the Diplomatic Character; but the *Status* of the Consul in the Levant, as well as in China, is altogether exceptional, and rests upon special Treaty-engagements between the Christian and the Mahommedan or Buddhist Powers[84]. The Consul is not the bearer of Letters of Credence, but he receives a Commission (lettre de provision) signed by the Sovereign authorising him to discharge

84 Under special Treaty-engagements the Consuls and Vice-Consuls of Great Britain in the Levant and in China exercise jurisdiction over British subjects, and between British subjects and native inhabitants.

the duties of Consul in the place where he is to reside: his nomination is not addressed to the Chief of the State, but his appointment is communicated to the Government, and its permission is required to enable him to enter upon his functions. This permission is given by a Rescript or Order from the Foreign Department of the State, to which the Consul is accredited, termed an *Exequatur*, the form of which varies in different countries, but the purport of which is to authorise the functionaries of the Home as distinguished from the Foreign Department of the Government to recognise the Official Character of the Consul.[85] The Consul cannot enter upon his functions before the delivery of the *Exequatur*, which may be revoked at any time at the discretion of the Government of the Country, wherein he is established. It is not unusual in the case of Consuls established in the Free Cities of the Germanic Confederation, and in Mahommedan Countries, that they should also be accredited as Agents for Political purposes, or as Chargés d'Affaires. Under such circumstances they are invested with the Diplomatic Character, and are entitled to the privileges of Public Ministers. It is conformable to the principles of Public Law that the Consul, who is also Chargé d'Affaires, should not engage personally in trade. In the case of ordinary Consuls some Nations permit and others allow their Consuls to trade. A Consul, who is engaged in trade, is amenable in all that regards his trade to the Local Jurisdiction equally as any private merchant, and although he may be a natural-born subject of the State whose Commission he bears, he will notwithstanding his Commission of Consul, acquire by continuous resi-

[85] There are various grades in the Consular department, such as Consul-General, Consul, Vice-Consul, Consular Agent.

dence and trade a Commercial Domicil in the Country, in which he maintains his trading Establishment, and his property may thus in case of war be liable to be treated as the property of an Enemy by any Power which is at war with the Country in which he carries on his trade.

CHAPTER XII.

RIGHT OF TREATY.

Sacred character of Leagues between Nations—Leagues may be in confirmation or in extension of Natural Right—Religious obligation of every League—Equal and Unequal Leagues—Unequal Leagues not contrary to Equity—Personal and Real Leagues—Tests of Continuing Leagues—The Holy Alliance of 1815 a strictly personal League—History of the Holy Alliance—The Family Compact of the House of Bourbon—Treaties of Navigation and Commerce—Treaties of Jurisdiction—Treaties of Extra-tradition—Civil law of the Romans as to fugitives from Justice—Common Law of Nations—Extra-tradition of fugitive slaves and of deserters a frequent subject of Treaty-engagement—Extra-tradition of political offenders exceptional—Treaties of Boundary—Judicial Decisions as to the permanence of certain Treaty-Engagements—Treaties which create a Servitude of Public Law—Treaties of Equal and Unequal Alliance—Treaties of Protection—Treaties of Subsidy—Treaties of Guaranty—Treaties of Neutrality—Conclusion and Ratification of Treaties—Termination and Renewal of Treaties.

The sacred character of Leagues between Nations.

§ 207. It has been observed in discussing the International Relations which existed between the Christian Powers of Europe and the Ottoman Porte at the conclusion of the Eighteenth Century, (§ 61,) that it was a maxim of the Mahommedan world, that there was no other Law of Nations than that which is derived from Positive Compact or Convention. Such also seems to have been the condition of things contemplated by the Roman Jurists, when they admitted the possible existence of an intermediate state between amity and hostility, in which the members of one Nation might stand in relation to the members of another Nation, when there was no League between the Nations themselves. It appears to have been a

maxim of the Roman Law[1] in reference to such Nations, that although they were not to be regarded by the Romans as Enemies, yet if any thing should find its way out of Roman territory into their country it would become their property, and if a Roman citizen should be captured by them, he would become their slave, whilst Roman citizens would be entitled to exercise analogous control over persons and things appertaining to such Nations, and happening to come within Roman territory. A doctrine of similar import was upheld amongst the ancient Greeks, and the practice of Statesmen in such matters found countenance in the writings of Philosophers. If we travel back to a period still more remote, we find that amongst the Jews of olden time it was denied that any satisfaction was to be made to an injured party who was a foreigner, unless his Nation was a Confederate of the Jewish Nation. There might however be Communities beyond the pale of the *Race* in the case of the Jew and the Greek, and beyond the precincts of the *Asylum* in the case of the Romans, towards whom Religion would enjoin the performance of the most friendly acts, if Public Covenants to that effect had been made with them, and when such Covenants had been made by the Sovereign Power in behalf of the Nation, the whole Nation was considered to be exposed to the wrath of the Deity, if any individual violated them in any respect. It thus became a matter of the last importance of Nations to reduce into a system the making of Public Covenants or

[1] Pomponius apud Dig. XLIX. Tit. XV. § 5. Nam si cum gente aliqua neque amicitiam, neque hospitium, neque fœdus amicitiæ causa factum, hi hostes quidem non sunt; quod autem ex nostro ad eos venit illorum fit, et liber homo noster ab eis captus servus fit eorum. Idemque est, si ab illis ad nos aliquis pervenerit.

Leagues, and the observance of the obligations of Law resulting therefrom. The Roman Nation from its peculiar origin, being founded on the Right of Sanctuary, seems to have felt an instinctive want of more definite institutions for this object than any which we discover amongst the Greek Races, and we find accordingly a religious Corporation established in Rome at a very early period, the Collegium Fetialium, whose special business it was to determine the conditions and to regulate the forms under which the Roman People could denounce Treaties and declare War without incurring the anger of the Gods.

Leagues may be in confirmation or in extension of Natural Right.

§ 208. Grotius[2] has adopted a twofold division of Leagues, arising from the matter thereof, namely, those which require such things only as are agreeable to the Law of Nature, and those which add something more thereunto. Puffendorf[3], whilst he approves the principle of this division, subdivides the latter class, and thereby virtually adds a third class, namely, those which restrain the duties of Natural Law, when they are too general and indefinite, to certain and particular articles. "Leagues," says Grotius, "of the first kind are generally made between enemies upon the conclusion of a war, and formerly were often made, and indeed were in a certain manner necessary, between those who had never contracted any engagement towards one another; which arose from this circumstance, that the Rule of Natural Right, which maintains that there is a kind of Natural Relationship between all mankind, and therefore that it is wrong for one man to harm another, had become effaced by evil habits, as of old before the Deluge, so likewise sometime after the Deluge, so that it was accounted

[2] De Jure B. et P. L. II. c. 15. § 5.

[3] Law of Nature and of Nations, L. VIII. c. 9. § 1.

lawful to rob and plunder Strangers, without declaring war[4]. So inveterate indeed was the corruption of manners amongst the Greeks, that Aristotle, the Philosopher of Practical Life, maintained that hunting, as a branch of warfare, was a Natural habit of mankind, as respects wild beasts and such individuals of the human race, as, being intended by nature to be in a subject state, refuse to submit themselves[5].

Religious obligation of every League.

§ 209. A League in its simplest form was but the extension of the Religious Obligation, under which Fellow-Citizens stood towards one another, as votaries of the same Gods. It was the formal recognition on the part of two Nations of a reciprocity of Duty and Right under a common Sanction. Thus the Amphictyonic Confederation was a League of States, in which the Religious character was paramount, all the members of the League being votaries of Apollo, and making offerings to that Deity in common at the Delphic Shrine.

The *Civitas* or *Nation* was in its earliest form a body of persons making sacrifices to the same Deities. The *Stranger* was beyond the pale of the common Religion of the *Civitas*. There was accordingly no obligation upon the members of a State in respect of a Stranger, as such, corresponding to the obligations which existed amongst Fellow-Citizens, who could appeal in the last resort to a Divine Sanction, which was acknowledged by all alike. The League, however, admitted the Stranger within the pale of Religion,

4 Thucydides describes in like terms the manners of the early Greeks, L. I. c. 5. Servius, in his Commentary upon the eighth and tenth Æneid, speaks in similar language of the Tyrrhenians; Diodorus Siculus, L. V. c. 34. reports the same of the Iberians, and Cæsar de B. Gall., L. VI. c. 23. says of the Germans, Latrocinia nullam habent infamiam, quæ extra fines cujusvis civitatis fiunt.

5 Politica, L. I. § 3.

and the ceremony of his admission was the offering of a common sacrifice to the Deity. Hence we find amongst the Greeks that the simplest form of League was denoted by the term σπονδή, which signifies a common libation poured out to the Gods, and which had a symbolic character, seeing that the Contracting Parties mixed wine together as an emblem of concord, and then poured it forth in common with a prayer, that whoever should first break the compact might have his blood poured forth in like manner.[6] The conclusion of a League between two Nations constituted a State of amity between them, which put an end to that vague condition which Sallust[7] describes, when he speaks of King Bocchus as "nobis neque bello neque pace cognitus."

Under the simplest head of Leagues may be classed all Compacts between Nations for freedom of Commerce and for Hospitality towards Strangers of either Nationality, as being agreeable to the Law of Nature. A Nation may enter freely into Leagues of this kind with every Nation, as the duties involved in them cannot conflict with one another, any more than the duties of Natural Law. "No person," says the Advocate of King Perseus before the Achæan Assembly, "seeks to induce you to enter into any new Alliance, which will embarrass us, but only into an agreement which will secure to each party freedom of Commerce and reciprocity of Right. Such an agreement will not be inconsistent with our Alliance with the Romans."

Unequal and Equal Leagues.

§ 210. Leagues, which add something to the Natural Law of Nations, are divided by Grotius into Equal and Unequal Leagues. Puffendorf adopts the

6 Homer, Il. III. 300.

7 Sallust. de Bello Jugurthino, c. 22.

same classification. The first are such as are concluded on equal terms, when not only the engagements themselves are equal on both sides, either absolutely or in proportion to the strength of either party, but also when neither party is by such engagements rendered in any way dependent upon the other. Unequal Leagues are of two kinds, according as the inequality regards the stronger or the weaker party. The stronger party may undertake to give assistance without requiring it in return, or to perform more in proportion than the weaker State is required to do, or the weaker State may submit to conditions which limit the exercise of its Natural Right of independence. For instance, a Nation may undertake to account the friends and enemies of another Nation as its own friends and enemies, or not to fortify particular parts of its own territory, or not to keep on foot more than a certain number of trained soldiers or war ships, without being shorn of its Independence in any way. On the other hand, if a Nation undertakes not to make peace or war at all without the consent of another Nation, or not to send or receive Ambassadors, such an undertaking would substantially impair its Independence, and the Nation which has so contracted with another Nation will have become virtually dependent upon it.

Unequal Leagues not contrary to Equity.

§ 211. Vattel[8] has made a distinction between Unequal Leagues which are contrary to Equity, and Unequal Leagues which are not contrary to Equity, and consequently not contrary to Natural Law. Of the latter kind are those which contain conditions which a Nation may feel authorised by the care of its own safety to impose upon another Nation, either by way of precaution against probable danger, or by way of

[8] Droit des Gens, L. II. § 180.

penalty in order to punish an unjust aggressor, and to render the Nation incapable for some time of renewing its aggression. A Nation, which has been victorious in war, dictates for the most part to its adversary unequal terms of peace. There is a limit, however, beyond which such inequality may not extend without awakening the alarm and enlisting the sympathy of other Nations in behalf of the vanquished. "Sound policy," writes Vattel, "will not permit a Great Power to suffer the Small States in its neighbourhood to be oppressed. If it abandons them to the ambition of a Conqueror, the latter will very soon become formidable to it in its turn. Accordingly Sovereigns, who are in general sufficiently true to their own interests, seldom fail to observe this maxim. Hence the Leagues, at one time against the House of Austria, at another time against its Rival, according as the one or other Power preponderated. Hence that Equilibrium, the perpetual object of Negociation and War."

Personal and Real Leagues.

§ 212. Another celebrated distinction of Leagues, which is recognised by Grotius[9] and Puffendorf, is that which divides them into Personal and Real. "The former," says Puffendorf[10], "are such as are made with the Prince purely with relation to his Person, and expire with him; the latter are such as are made with the Kingdoms or Commonwealths, rather than the Prince or Government, and these outlive the Ministry and the Government itself, under which they were first made." Vattel[11] adopts a somewhat clearer and sounder definition, when he says that Personal Treaties relate to the *persons* of the Contract-

9 De Jure Belli et Pacis, L. II. c. 16. § 16.
10 Law of Nature and of Nations, L. VIII. c. 9. § 6.
11 Droit des Gens, L. II. § 183.

ing Parties, and are confined and in a manner attached to them; whilst Real Treaties relate only to *things* or matters in negociation between the Contracting Parties, and are wholly independent of their persons. A Personal Treaty expires with him who contracts it; a Real Treaty attaches to the body of the State, and subsists as long as the State, unless the period of its duration has been expressly limited. It is of great importance not to confound these two kinds of Treaties. Accordingly Sovereigns are at present accustomed to express themselves in their Treaties in such a manner as to leave no uncertainty in this respect, and this is doubtless the best and surest plan. In default of this precaution the subject-matter of the Treaty, or the expressions in which it is conceived, may furnish means to ascertain whether it be Real or Personal.

Tests of Continuing Treaties.

§ 213. Vattel has laid down certain general rules for ascertaining the character of a Treaty, whether it be a continuing Treaty after the death of one of the Contracting Parties. The circumstance, that a Treaty is concluded in the name of a Sovereign Prince, does not thereby constitute it a personal Treaty, although when a Treaty is concluded in the name of a Republic or Popular Government, it is the Nation itself which contracts, and the Treaty is undoubtedly a Real Treaty. Public Treaties concluded by a King are Treaties of the State, and are obligatory on the Nation over which the King is Sovereign, and which he represents for external purposes. The presumption accordingly, in respect of every Public Treaty, is, that it concerns the State itself, and is so far a Real Treaty. The question however as to its continuance is not thereby settled. It may be binding on the Nation, but the length of time during which it shall

bind the Nation, may vary with the terms of the Treaty, or the subject-matter of it. Thus if a Treaty is concluded for a certain number of years, or is declared to be perpetual, its duration will not be dependent upon the lives of the contracting parties; or if a King declares in a Treaty that it is made for Himself and his Successors, or that it is made for the good of his Kingdom, it is manifest that the Treaty is intended to last as long as the Kingdom itself. In case of doubt, if there be no expressions in the Treaty itself, or any circumstance *dehors* the Treaty which will determine its duration, it ought to be presumed to be a Real Treaty, if its provisions are favourable; if its provisions on the other hand are odious, it may be with reason concluded to be a Personal Treaty, and as such intended to expire upon the death of either of the Contracting Parties. By *favourable provisions* are meant such provisions as tend to the mutual advantage of both the Contracting Parties; by *odious provisions* are understood such provisions as are either an absolute burden upon one of the Parties, or are more burdensome on the one than on the other Party. This rule for determining the continuing operation of Treaties is conformable to Reason and Equity. In the absence of certainty, we must have recourse to probability. When the question relates to things favourable and equally advantageous to both Parties, it is consistent with probability that they should intend their contract to be permanent, and no injury can result to either Party by the contract being perpetuated. If, on the other hand, there be any thing odious in the Contract, if there be penal or prohibitive clauses in the Treaty which lay a burden upon one of the Parties to it, there is no reasonable ground for supposing in the absence of positive words to that

effect, that the Sovereign, who entered into such engagements, intended to burden his kingdom for ever. On the contrary, every Sovereign is presumed to desire the safety and advantage of the Nation which he represents, and not to intend to load it for ever with a burdensome obligation. On the other hand, it is consistent with probability, that the Party to the Treaty, who has imposed a burden on the other Contracting Party, if it was mutually intended by them that he should enjoy his advantage for ever, would not have neglected so to stipulate as to place the matter beyond a doubt; well knowing that mankind seldom submit to burdens unless bound by formal obligations. If this presumption should be in a particular case inconsistent with the fact, and it should deprive a party of his Right, it will be a consequence of his own negligence. Thus much is certain, that if one or other of the Contracting Parties must sacrifice a Right, it will be a less violation of Equity, that the one should forego an anticipated advantage, rather than the other should suffer an unexpected loss. It is the famous distinction between "de lucro captando et de damno vitando."[12]

The Holy Alliance of 1815 a strictly Personal League.

§ 214. The term "League," has been adopted by Kennett, the translator of Puffendorf, to distinguish that species of Public Compact between Nations which does not presuppose a State of War. Truces and definitive Treaties of Peace, which presuppose a State of War, belong to another Category, and will be considered apart. The most remarkable instance in modern times of a *Personal League*, is that which was concluded at Paris, (14 Sept. 1815[13],) between

[12] Droit des Gens, L. II. § 190.

[13] Martens, N. R. II. p. 656. British and Foreign State Papers, 1815–1816, p. 211. The words "Au nom de la très Sainte et indivisibile Trinité," are prefixed to the Treaty, which circumstance is not without precedent.

the Emperor of Austria, the King of Prussia, and the Emperor of Russia; and which has been designated *the Holy Alliance.* It was signed in triplicate by the three Sovereigns personally, and does not bear any Ministerial countersignature. It was published at St. Petersburg, on Christmas Day, 1815, by the Emperor Alexander, accompanied with a Manifesto, announcing that the object of the Alliance was to establish a Christian Fraternity amongst the Nations of Europe. The majority of the Sovereign Princes of Europe subsequently acceded to this Alliance, upon the invitation of one or other of the three Contracting Parties, but the Prince Regent of Great Britain was formally precluded by considerations of Constitutional Law from annexing his signature to it, as appears by his Letter of October 6, 1816. Much has been said of this Alliance both in praise and dispraise of it. It has been extolled as a declaration of the purest International Morality, it has been condemned as a Monarchical Compact against Popular Liberties. If its history be considered, and its contents examined, it may result that it neither deserves the encomiums bestowed upon it, nor merits the opprobrium lavished against it. It was a romantic effusion of political sentiment on the part of the Emperor Alexander, which had no practical meaning, and which Prince Metternich, Prince Hardenberg, and Lord Castlereagh combated in vain; and to which the Emperor of Austria and the King of Prussia unwillingly acceded, from personal considerations towards their ally. Its tone savours more of a Papal Rescript than a Political Treaty, for the sum and substance of it is to affirm, that the Princes of Europe and their Peoples are members of one Great Christian Nation, and that Peace amongst those members can only be pre-

served by the practice of the duties which the Saviour of mankind has inculcated. Klüber regards the Holy Alliance as the formal application of Christian Morality to the Government of mankind, and to the mutual intercourse of Nations. Its place in the system of the Public Law of Europe was fixed by the Protocol of 15 Nov. 1818, signed by the Plenipotentiaries of Austria, France, Great Britain, Prussia and Russia, assembled in conference at Aix-la-Chapelle, in which it is spoken of as forming "a bond of Christian Fraternity amongst the Sovereigns themselves[14]." The declaratory part of the Treaty is as follows: "Déclarent solennellement, que le présent Acte n'a pour objet que de manifester, à la face de l'Univers, leur détermination inébranlable, de ne prendre pour règle de leur conduite, soit dans l'administration de leurs Etats respectifs, soit dans leur relations politiques avec tout autre gouvernement, que les préceptes de cette Religion Sainte, préceptes de justice, de charité, et de paix, qui, loin d'être uniquement applicables à la vie privée, doivent, au contraire, influer directement sur les résolutions des Princes et guider toutes leurs démarches, comme étant le seul moyen de consolider les Institutions humaines et de remédier à leurs imperfections[15]."

History of the Holy Alliance.

§ 215. The Holy Alliance was so singular in its conception, and its political import was so totally different in fact from what has been generally supposed, that it may not be superfluous to give a short account of it.

[14] Qu'elles sont fermement décidées à ne s'écarter ni dans leurs relations mutuelles, ni dans celles qui les tient aux autres états, du principe de l'Union intime, qui a présidé jusqu'ici à leurs rapports et interêts communs; union devenue plus forte et indissoluble par les liens de fraternité Chrétienne que les souverains ont formés entre eux. Martens, N. R. IV. p. 555.

[15] Martens, N. R. II. p. 657.

The Emperor Alexander of Russia was liable to periodical accesses of political excitement, which breathed sometimes the Spirit of Absolute Monarchy resting on Divine Right, at others savoured of the lessons which he had early imbibed in an opposite spirit under the tuition of La Harpe. It was under the influence of strong excitement of the former character, that he communicated to his two Allies at Paris his project for the establishment of a Christian Fraternity amongst the Sovereigns of Europe. Both these Monarchs endeavoured in vain by reasoning with their august Ally to persuade him to abandon his project, and the arguments of their Ministers, Prince Metternich and Prince Hardenberg, as well as of Lord Castlereagh, who represented the Prince Regent in the Conferences at Paris, had as little weight with him as the intercessions of the Sovereigns. So excited indeed was the imagination of the Emperor Alexander by the general opposition to his views, that the Emperor of Austria expressed to Prince Metternich and Lord Castlereagh his conviction, that, if the Allies persisted in refusing altogether to sanction the Emperor's project, the effect might be seriously prejudicial to his mind. It was determined accordingly, with a view to deprive the Alliance of all substantial importance as a Political Act, that it should receive the signatures of the Sovereigns alone, without any Ministerial counter-signature. After the document had been drawn up and signed by the three Sovereigns, a copy was transmitted to Lord Liverpool, who was the Chief of the British Cabinet, by Lord Castlereagh, accompanied by an autograph letter addressed to the Prince Regent, written by the Emperor of Russia himself and signed by the three Allied Sovereigns, in the following terms :—

Paris, le 26 September, 1815.

MONSIEUR NOTRE FRÈRE ET COUSIN,

LES évènemens, qui ont affligé le monde depuis plus de 20 ans, nous ont convaincu que le seul moyen d'y mettre un terme se trouvoit dans l'Union la plus franche et la plus intime entre les Souverains, que la Divine Providence a placé à la tête des Peuples de l'Europe. L'Histoire des 3 années mémorables, qui viennent de s'écouler, atteste les effets bienfaisants, que cette Union a produit pour le salut de l'humanité, mais afin d'assurer à ce lien la solidité que réclame impérieusement la grandeur et la pureté du but, vers lequel il tend, nous avons pensé qu'il dût être fondé sur les principes sacrés de la Religion Chrétienne.

Profondement pénétré de cette importante vérité, nous avons conclû et signé l'Acte, que nous soumettons aujourd'hui à la méditation de votre Altesse Royale. Elle se persuadera qu'il à pour objet de raffermir les rapports qui nous unissent, en formant de tous les Peuples de la Chrétienté une seule et même Famille, et en leur assurant par là, sous la protection du Tout-Puissant, le bonheur, le salut, les bienfaits de la paix et des liens de fraternité à jamais indissolubles. Nous avons vivement regretté que Votre Altesse Royale n'ait point été réuni avec nous dans le grand moment où nous avons conclu cette Transaction. Nous l'invitons comme notre premier et plus intime Allié à y accorder, et à completer une œuvre uniquement consacré au bien de l'humanité, et que nous devons dès lors considérer comme la plus belle récompense de nos efforts.

FRANCOIS.
FREDERIC GUILLAUME.
ALEXANDRE.

Notre Frère et Cousin,
Le Prince Régent de la Grand Bretagne.

Lord Castlereagh at the same time took the precaution of transmitting the draught of an innocuous answer for the Prince Regent to send back. This draught underwent a careful revision at the hands of

Lord Liverpool, and the contents of it, as ultimately settled, were as follow :—

Carlton House, 6th Oct. 1815.

SIR, MY BROTHER AND COUSIN,

I HAVE had the honour of receiving your Imperial Majesty's Letter, together with the Copy of the Treaty signed by your Majesty, and your August Allies, at Paris, on the 26th of September.

As the forms of the British Constitution, which I am called upon to administer in the name and on the behalf of the King, my Father, preclude me from acceding formally to this Treaty, in the shape in which it has been presented to me, I adopt this course of conveying to the August Sovereigns who have signed it, my entire concurrence in the principles they have laid down, and in the declaration which they have set forth, of making the Divine precepts of the Christian Religion the invariable rule of their conduct, in all their relations, social and political, and of cementing the Union which ought ever to subsist between all Christian Nations; and it will always be my earnest endeavour to regulate my conduct, in the station in which Divine Providence has vouchsafed to place me, by these sacred maxims, and to cooperate with my August Allies in all measures which may be likely to contribute to the peace and happiness of mankind.

With the most invariable sentiments of friendship and affection,

I am,
Sir, My Brother and Cousin,
Your Imperial Majesty's Good Brother and Cousin,
GEORGE P. R.

His Imperial Majesty
the Emperor of Austria.

The Family Compact of the House of Bourbon.

§ 216. The Treaty of Friendship and Union concluded at Paris (August 15, 1761[16]) by the Plenipotentiaries of the Very Christian King and the Catholic

[16] Martens, Recueil, I. p. 16.

King, is an instance of a *Family League*, which may be regarded as an enlarged form of a *Personal League*. The object of this Treaty, which is expressly designated in the Preamble as a Family Compact, was to establish a perpetual alliance between the French and Spanish branches of the House of Bourbon, and to afford to either Crown a reciprocal guaranty of all its possessions wheresoever situated. The simple demand of succour on the part of either Crown was to constitute a *casus fœderis* without the necessity of any explanation. Provision was made by the nineteenth article of the Treaty for the admission of the Neapolitan branch of the House of Bourbon. Although this Treaty was made by the two Sovereigns on behalf of themselves and their Successors, and so far in terms satisfies one of Vattel's definitions of a Real Treaty[17]; yet the subject of it discloses the intention of the Contracting Parties to confine its benefits to the House of Bourbon, so clearly, that it may be regarded as altogether exceptional[18], seeing that it contains an express provision (Art. XXI), that no other Powers than those which may be of the House of Bourbon, can be invited or admitted to accede to it. Accordingly we find, when His Catholic Majesty made a formal application to Louis XVI of France in 1790

[17] Droit des Gens, L. II. § 188. De même, lorsqu'un roi déclare dans le traité, qu'il le fait *pour lui et ses successeurs*, il est manifeste que le Traité est réel. Il est attaché à l'Etat, et fait pour durer autant que même le royaume.

[18] Kings do not always treat solely and directly for their Kingdoms. Sometimes by virtue of the power they have in their hands, they make treaties relative to their own persons, or their families, and this they may lawfully do as the welfare of the State is interested in the safety and advantage of the Sovereign, properly understood. These treaties are personal in their own nature, and expire of course on the death of the King or the extinction of his family. Such an alliance is made for the defence of the King and his Family.—Vattel, L. II. § 195.

for aid, in pursuance of this Treaty, in defence of his possessions on the West Coast of North America against Great Britain; the National Assembly, to which body Louis XVI was obliged, under the altered condition of the Monarchy in France, to submit the letter of the King of Spain, demurred to the application, considering the Family Compact between the two Crowns not to be identical with a Public Treaty between the two Nations[19].

Treaties of Navigation and Commerce.

§ 217. The object of all Leagues is the promotion of Society amongst Nations, and this Society relates either to peaceful Commerce, or to community of War[20]. Leagues which relate to Commerce may be of various kinds. The rudiments of Commercial Leagues may be traced in the stipulations between Nations for the hospitable reception of Strangers, and the distinction between the foreigner regarded quâ *βάρβαρος*, and the foreigner regarded quâ *ξένος*, consisted in the circumstance, that the latter had a claim of *Right* to Hospitality, which the former had not. An early example of this kind of League may be seen in the Treaty concluded between Alyattes King of Lydia and the Citizens of Miletus, whereby it was provided that the two Nations should be the guests and allies of one another[21].

As soon as the security of private intercourse between the individual members of different Nations had been established, the commercial interchange of commodities for the most part followed in the wake of Hospitality. Foreign commerce thus sprang up, and in many States where foreign commerce became important, it was found necessary to place it under regulations,

19 Twiss on the Oregon Question, London, 1846, p. 112. Annual Register, 1790. p. 303.

20 Puffendorf, c. 8, c. 9.

21 Herodot. Hist. L. I. § 22.

and wherever Taxation became an engine of State government, duties or tolls came to be imposed upon foreign merchants frequenting the ports of a State. Treaties of Navigation and of Commerce thereupon came to be agreed upon between Nations, whereby it was provided that the subjects of the one Power might safely trade in the ports of the other Power on condition of paying customary tolls, or of paying not more than a fixed toll, or of paying not more than was paid by subjects or favoured Allies.

A Treaty of Navigation and Commerce may be for a term of years or for an indefinite period; it may provide for trade merely, as for instance for the importation and exportation and transit of particular merchandise, for the port-dues, and transit-dues, and custom-dues, to be levied thereupon; or for the incidents of trade in connexion with the residence of merchants; as for instance, the exercise of jurisdiction, the practice of religion, the payment of personal taxes. The provisions of a Treaty of Commerce may extend even further, and may apply to the contingences of war breaking out between the contracting parties and a third Power, or between Powers which are strangers to the contracting parties. Thus it may be provided that, if war should break out between the contracting Powers, the subjects of either Power, resident in the territory of the other Power, should be allowed an interval of time to collect their goods and effects, and to withdraw in safety to their own country[22]; or it may be provided, that if war should break out between one of the Contracting Powers and a third Power, that certain goods shall

[22] Such Stipulations have become an accustomed *formula* in Commercial Treaties. — Kent's Commentaries, I. § 56. Martens Précis, § 259. Bynkershoek, Qu. Jur. Publici, L. I. c. 7.

not be regarded by the former as Contraband of War, or that certain vessels shall not be liable to search or seizure by the former, if laden with cargoes belonging to the subjects of any third Power, or that Privateers shall not be allowed to be fitted out or provisioned in the ports of one of the contracting parties by any Third Power engaged in war with the other contracting party[23]. Again, it may be provided in case of war breaking out between Powers which are Strangers to the contracting Parties, that the latter will maintain the security of their mutual commerce on the High Seas by an armed force, if it should be required ; or that debts due from the individuals of the one Nation to individuals of the other, and the shares or money which they may have in the public funds, or in public or private banks, shall never in any case of war be sequestrated or confiscated; or that foreign subjects shall be permitted[24] to remain and continue their business (if it be other than that of commerce on the high seas), notwithstanding a rupture between the Governments, so long as they conduct such business innocently[25].

A Nation may enter into a Treaty by which it grants exclusive privileges of trade to one Nation, and deprives itself of the liberty to grant similar privileges to another. Of this kind was the famous Methuen Treaty[26], concluded between Great Britain and Portugal (27 Dec^{r}. 1703), whereby Portugal obtained a

[23] Treaty between France and the United States of America, 6 Feb. 1778. Martens, Recueil, II. p. 595.

[24] Treaty between Great Britain and the United States of America, 19 Nov. 1794. Martens, Recueil, V. p. 662. Grotius de Jure B. et P. L. III. c. 20. § 16.

[25] Treaty between the United States of America and the Republic of Chili, 16 May, 1832. Martens, N. R. XI. p. 439. The provisions of this Treaty deserve attention, as they are most comprehensive.

[26] Chalmers' Collection of Treaties, T. II. p. 305.

preferential scale of duties for her wines in British markets, whilst Great Britain, on the other hand, obtained what she considered to be a satisfactory equivalent, by securing the opening of the Portuguese markets for her woollen manufactures. It was formerly the policy of the Christian Nations of Europe to obtain exclusive privileges of trade by Treaties with Asiatic and African Nations. Thus the Dutch engrossed to themselves the trade in cinnamon and other produce of the island of Ceylon, by a Treaty with the King of Candy[27]. An opposite policy now prevails; and we find accordingly Great Britain taking care to recite in her Treaty[28] with China, that the Five Ports had been declared to be open to the trade of all Nations heretofore trading at Canton, and stipulating only for her own subjects the same privileges, as should at any time be accorded to the Subjects of other Powers.

Treaties of Jurisdiction.

§ 218. Treaties of Jurisdiction are for the most part of two kinds: they either provide for the establishment of special tribunals for the adjudication of all questions which may arise amongst foreign merchants, or between foreign merchants and the Subjects of the State wherein such merchants carry on their trade; or they provide for the exercise of jurisdiction by Consuls or Commercial Agents over their own countrymen within the territory of the State wherein they carry on their trade, or over their own countrymen and the subjects of such State, in matters of trade which may come into dispute between them. A foreigner, under the Common Law of Nations, may

[27] Traité de Paix entre la Hollande et le Roi de Candy, (14 Feb. 1766). Martens, Recueil, T. I. p. 319.

[28] Supplemental Treaty of Houmon-Schai, (8 Oct. 1845). Martens, N.R. Gén. T. V. p. 595.

sue a Subject of the State wherein he resides in the Courts of that State, and he may be sued in those Courts by Subjects of that State. A foreigner may in like manner sue a foreigner in the Courts of a State wherein they are both resident. Jurisdiction, as between Nations being territorial is founded by the presence of an individual within the territory of a Nation.

The Tribunals however of a State are not under any obligation to administer the Law of a Foreign State, unless there be a Treaty between the States to that effect. In the cases where Treaties provide for the erection of tribunals, to decide all controversies between Strangers (transeuntes) who are not domiciled, such tribunals administer the Foreign Law, if it be invoked to settle the dispute. Thus there were Treaties between Great Britain and Portugal[29], and between Great Britain and Spain[30], and between France and Spain, and between France and Portugal, and between Spain and Portugal, under which special tribunals were provided, over which a Judge Conservator was appointed to preside; whose function it was to decide all disputes in commercial matters, which might arise between the Subjects of the respective States. If, however, a Natural born subject of Great Britain or of France, had acquired a Domicil in Spain or Portugal, he became amenable to the ordinary tribunals of either country[31] in any controversy with the Subjects of that country. On

[29] Treaty of Westminster, 10 July, 1654. Hertslet, II. p. 8. Treaty of Rio Janeiro, 19 Feb. 1810. Hertslet, VI. p. 28. Martens, N. R. III. p. 194. These engagements have been determined by the Treaty of London, July 3, 1842. Hertslet, VI. p. 598.

[30] Treaty of Madrid, 23 May, 1667. Hertslet, II. p. 140. Treaty of Utrecht, 9 Dec. 1713. Hertslet, II. p. 205.

[31] Fœlix, Droit International Privé, § 148.

the other hand, Treaties provide sometimes for the exercise of an alternative Jurisdiction, as for instance, the Treaty of St. Petersburg[32], concluded between France and Russia, (11 Jan. 1857,) provided that the Consuls of either Power should exercise an exclusive jurisdiction over the masters and crews of the vessels of their own Nation within the Ports of the other Nation; and should exercise a *voluntary* jurisdiction over merchants of their own Nation, which, if such merchants had recourse to it, the Government of the country to which the Consuls were accredited should enforce; but such merchants might, if they were so minded, in the first instance, have recourse to the ordinary tribunals of the country, which by the local law were empowered to take cognizance of commercial matters. Russia, at the period when this Treaty was concluded, was in substance an Oriental Power, and there are accordingly found in this Treaty a variety of provisions, which are affirmations of the Common Law of Nations, as then received in Western Europe; which, however, had not at such time acquired the sanction of Usage, as a rule of intercourse between Russia and the Western Powers.

Treaties which give an exclusive authority to the Consuls and Commercial Agents of a Nation to decide all disputes amongst merchants of their own country, and between merchants of their own country and the Subjects of the State to which they are accredited, are for the most part founded on a necessity arising out of the great discrepancies which exist between the Laws of the respective Nations in Civil and Criminal matters. The Christian Powers of Europe have from a very early period entered into

[32] Martens, Recueil, IV. p. 196.

Treaties of this kind with the Ottoman Porte[33], and with its Dependencies on the Barbary Coast[34], under which the Consuls of such Powers have exercised an exclusive jurisdiction over their own countrymen in all matters of difference amongst themselves. Treaties for an analogous purpose have been within recent time concluded between Great Britain and China[35], (29 July, 1843,) and between Great Britain and Japan[36], (26 August, 1858,) with the further provision, that all controversies arising in China or in Japan, between British and Chinese Subjects on the one hand, and between British and Japanese Subjects on the other, shall be determined by the British Consul, assisted in the one case by a Chinese, in the other by a Japanese Officer. The Jurisdiction over British Subjects in Criminal matters is to be exercised exclusively by the British Authorities, even in cases where British Subjects commit any crime against Chinese or Japanese Subjects, or the Subjects or Citizens of any other country. In the Treaty concluded between the Emperor of China and the United States of America[37], (July 3, 1844,) there is a provision to the effect, that all controversies occurring in China, between Citizens of the United States and the Subjects of any other Government, shall be regulated without any regard to the Chinese Authorities, or without any intervention on their part. It is the practice of France, in accordance with the principles of her Civil Law, to conclude Treaties with Foreign Powers, whereby Jurisdiction is granted to the Consuls of France over

33 Hertslet, Treaties, II. p. 346.

34 Algiers, Hertslet, I. p. 61, 70. Tripoli, ib. p. 127, 146. Tunis, ib. p. 161, 166.

35 Martens, N. R. Gén. V. p. 434. Hertslet, VI. p. 247.

36 Martens, N. R. Gén. XVI. part II. p. 430.

37 Martens, N. R. Gén. VII. p. 134.

French merchant vessels, in regard to any difference which may arise between the Captain, Officers, and Crews of such vessels, either on the High Seas or in the Ports of such Powers, and the aid of the Local Authorities is guarantied to support the Jurisdiction of the Consul, if he shall invoke it[38].

§ 219. Treaties of Extra-Tradition are another form of Treaty, whereby effect is given to the Jurisdiction of a State over its Subjects, who may have escaped into the territory of another State. The Common Law of Nations regards all Jurisdiction as founded on the possession of territory by an Independent Community. The Legislative Power of the Nation extends over all persons and property within the limits of its territory; but its laws do not operate *vigore suo* beyond its territory. Crimes against its Laws are altogether local, and cognisable only in the country in which they are committed. No other Nation, therefore, has any right to punish them, nor is under any obligation to take notice of them, neither is any other Nation bound to enforce any judgment rendered in such cases by the tribunals having authority to hold jurisdiction within the territory, wherein they have been committed[39]. Such has been the tenour of a long course of decisions in British Courts of Law. "Penal Laws of Foreign Countries are altogether local," says Lord Loughborough[40], "and affect nothing more than they can reach, and can be seized by virtue of their authority." Mr. Justice Buller in the same case upon a Writ of Error[41], says,

Treaties of Extra-Tradition.

[38] The Convention of 23 Feb. 1853, between France and the United States of America, contains this amongst other special engagements. Treaties of the United States, p. 114. Wheaton's Elements, 1857, p. 171.

[39] Story, Conflict of Laws, § 620.

[40] Folliott v. Ogden, I. H. Blackstone, p. 135.

[41] Ogden v. Folliott, 3 Term Reports, p. 733.

"it is a general principle that the Penal Laws of one Country cannot be taken notice of by another Country." A similar doctrine has been frequently recognised in the Courts of the United States of America. Thus Chief Justice Marshall[42], in delivering the judgment of the Supreme Court, in the case of a foreign vessel engaged in the Slave trade, which had been captured by an American Citizen, said, "the Courts of no Country execute the Penal Laws of another Country." So likewise Chief Justice Spencer, when called upon in the District Court of New York to give effect to a Law of Connecticut, said, "the Defendant cannot take advantage of, nor expect the Court to enforce the criminal Laws of another State. The Penal Acts of one State can have no operation in another State. They are strictly local, and affect nothing more than they can reach[43]."

Civil Law of the Romans as to Fugitives from Justice.

§ 220. Certain Jurists have maintained that a State is under an obligation to punish Fugitives from Justice, on the demand of the State from whose jurisdiction they have withdrawn themselves[44]; in other words, that a State is bound to allow its own Courts to exercise its own Jurisdiction over foreigners in respect of offences committed in Foreign Countries. But these writers rest this question too exclusively on the traditions of the Roman Civil Law, which regarded the various States of Christendom as succeeding to the relations which formerly existed amongst the Provinces of the Roman Empire. But the Roman Law, if carefully examined, suggests another principle, when it orders Fugitives from Justice to be

42 The Antelope, 10 Wheaton, p. 123.

43 Scoville v. Canfield, 14 Johnson's Reports, p. 338.

44 Hertius de Collisione Legum, § 4. n. 18. P. Voet de Statut. c. 4. n. 6.

remitted to the *forum delicti*. The grounds upon which such remission indeed was founded rest equally upon the Imperial Supremacy, "Jure tamen civili notandum, remissionibus locum fuisse de necessitate, ut reus ad locum ubi deliquerit, suo petente judice, fuerit mittendus, quod omnes judices uni subessent imperatori[45]." It would thus seem that in either case, whether the Criminal was tried in the place where he was found, or sent back for trial to the place where the crime had been committed, the Authority under which the trial or the remission of the Criminal took place was one and the same, namely, the Paramount Authority of the Emperor.

Common Law of Nations.

§ 221. In the case of Nations there is no corresponding Paramount Authority to which all defer, and Jurists are divided in opinion whether there is any obligation upon a Nation to deliver up Fugitives from Justice upon the demand of another Nation. States have without a doubt a right to refuse an asylum to the subjects of Foreign States. Martens designates this right as *Le Droit de Renvoi*[46]. From a passage in a letter written by Sir Leoline Jenkins[47] at Nimeguen to Mr. Secretary Williamson, (April 3, 1675,) it would seem, as if the early Usage amongst Nations had been for States to decline jurisdiction over foreigners altogether, and to send them to their own country to be tried by their Natural Judges, but that such Usage had become obsolete in his time, as he speaks of "the *matter of renvoy* being disused altogether amongst Princes." Certain Jurists however maintain, that according to the usage of Nations, States are obliged to refuse an asylum to the subjects

45 P. Voet de Statutis, s. XI. c. 1. n. 6.
46 Précis du Droit des Gens, § 91. *b*.
47 Life of Sir Leoline Jenkins, vol. II. p. 714.

is obvious between Conterminous States, where their military or maritime service is recruited by forced levies raised either by Conscription or by Impressment.

Extra-Tradition of Political Offenders, exceptional.

§ 223. The earliest Treaties of Extra-Tradition amongst the Nations of Europe since the fall of the Roman Empire appear to have been Treaties between Conterminous States such as England and Scotland (anno 1308), France and Savoy (anno 1378), for the surrender of Fugitives from Justice, who were charged with the commission of crimes against the peace of Society, such as murder, piracy, robbery, or forgery. M. Fœlix has reviewed the various Treaties which exist upon this subject amongst the Nations of Europe. France, Spain, Portugal, the Papal States, Holland, Sardinia, Belgium, Switzerland, and Great Britain, have severally entered into Treaties with various other Powers for the surrender of Fugitives from Justice who have been guilty of crimes against the person or against property; but they have not extended the engagements of such Treaties to persons accused of Political Offences. On the other hand, Russia, Austria, Prussia, and the various other States which compose the Germanic Confederation, the Two Sicilies, Denmark, Norway, and Sweden, have entered respectively into Treaties for the surrender of Fugitives from Justice, accused of High Treason against the State from which they have escaped. Amongst the American States we find Treaties of the former kind concluded by the United States, and by Brazil, and of the latter kind by Columbia, by Peru, and by Mexico. It will be seen that the surrender of Political Offenders is rather the exception, than the rule of such Treaties.

Every Treaty of Extra-Tradition takes effect in re-

gard to crimes committed before it was concluded, unless its operation shall be expressly restricted, but with regard to the character of any crime alleged as warranting the demand for the surrender of a Fugitive from Justice, all Treaties of Extra-Tradition are *stricti juris*, being penal in their character and in exception to the Common Law of Nations. Their operation accordingly may not be extended beyond the letter of their stipulations.

Treaties of Extra-Tradition for the most part temporary.

§ 224. Heffter has very aptly remarked that the very fact of the existence of so many special Treaties respecting the Extra-Tradition of Fugitivés from Justice is conclusive, that there is no such Usage amongst Nations, which constitutes the surrender of such Fugitives upon the demand of a State, whose laws have been violated, a perfect obligation upon other States. It is not unimportant to note, that Treaties of Extra-Tradition are for the most part made for a given term of years; as, for instance, the Treaty between Great Britain and the United States, (19 Nov. 1794[50],) was in this respect limited in duration to twelve years. This Treaty having expired in due course, in respect of the XXVIIth Article, which contained the provision for the Extra-Tradition of criminals, the United States accordingly maintained upon a demand being subsequently made by the British Government for the surrender of Daniel Sullivan, a British Subject, the master of a British Schooner, the Maria, who had run away with the Schooner and her cargo, and carried them into Mount Desart in the State of Maine, that as the engagement of the Treaty was for a limited time and had not been renewed, the United

50 Martens, Recueil, V. p. 686. Art. XXI. provided for the Extra-Tradition of all persons charged with the commission of murder or forgery within the jurisdiction of either State.

States were not under any obligation by the Common Law of Nations to restore the vessel and to deliver up the master and crew who had carried her off. Mr. Wirt, the Attorney General of the United States, in the legal opinion which he submitted to his Government, (Nov. 20, 1821,) stated, that he considered there was nothing in the Law of Nations, as explained by the Usage and Practice of the most respectable among them, which imposed on the United States any obligation to deliver up the Fugitives[51]. The Treaty of Washington, sometimes called the Ashburton Treaty, has been subsequently (9 August, 1842) concluded between the United States and Great Britain, under which the Extra-Tradition of the slave Anderson[52], who had escaped from the State of Missouri into Canada, was lately demanded: but there is in this Treaty an express provision that the tenth Article, which provides for the Extra-Tradition of Fugitives from Justice, shall continue in force until one or the other of the parties shall signify its wish to terminate it, and no longer. The Tenth Article is in the following terms: "It is agreed that Her Britannic Majesty and the United States shall, upon mutual requisitions by them or their ministers, officers, or

[51] Opinions of the Attorney Generals of the United States, I. p. 391.

[52] The Extra-Tradition of Anderson was demanded on a charge of murder. He was not delivered up, as the Court of Common Pleas in Canada, on motion for a *Habeas Corpus* to discharge him from the custody of the gaoler, to which he had been committed under a Magistrate's warrant, found that there were some informalities in the proceedings before the Magistrate, and directed him to be discharged. The Court of Queen's Bench in Canada had refused to grant a Writ of Habeas Corpus, and the friends of Anderson had thereupon applied to the Court of Queen's Bench in Westminster Hall for the Writ, which was granted. Before, however, the Writ from Westminster Hall could be served in Canada, the Court of Common Pleas in that Province had ordered the discharge of the fugitive.

authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other; provided, that this shall only be done upon such evidence of Criminality, as according to the Laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective Judges and other Magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such Judges or other Magistrates respectively, to the end that the evidence of Criminality may be heard and considered; and if on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining Judge or Magistrate to certify the same to the proper executive authorities, that a warrant may issue for the surrender of such fugitives. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive[53]."

The only other Treaty of Extra-Tradition, in regard to Fugitives from Justice, which Great Britain has entered into with a Foreign State, is the Treaty of London, (13 Feb. 1843,) concluded with France for the surrender in certain cases of Fugitives from Justice. By Art. I. "It is agreed that the High Con-

53 Hertslet, VI. p. 859. Martens, N. R. Gén. III p. 456.

tracting Parties shall on requisitions made in their name through the medium of their respective Diplomatic Agents, deliver up to justice persons who, being accused of the crimes of murder, (comprehending the crimes designated in the French Penal Code by the terms assassination, parricide, infanticide, and poisoning,) or of an attempt to commit murder, or of forgery, or of fraudulent bankruptcy committed within the jurisdiction of the requiring Party, shall seek an asylum, or shall be found within the territories of the other: provided that this shall be done only when the commission of the crime shall be so established, as that the laws of the country where the fugitive or person so accused shall be found, would justify his apprehension and commitment for trial, if the crime had been there committed.

Consequently, on the part of the French Government, the surrender shall be made only by the authority of the Keeper of the Seals, Minister of Justice, and after the production of a warrant of arrest, or other equivalent judicial Document, issued by a Judge, or other competent Authority in Great Britain, clearly setting forth the facts for which the fugitive shall have rendered himself accountable; and on the part of the British Government, the surrender shall be made only on the report of a Judge or Magistrate duly authorised to take cognisance of the acts charged against the fugitives in the warrant of arrest or other equivalent judicial document, issued by a Judge or competent Magistrate in France, and likewise clearly setting forth the said acts."

"The expense of any detention and surrender made in the preceding Article shall be borne and defrayed by the Government in whose name the requisition shall have been made."

"The provisions of the present Convention shall not apply in any manner to crimes of murder, forgery, or fraudulent bankruptcy committed antecedently to the date thereof."

"The present Convention shall be in force until the 1st of January, 1844, after which date either of the High Contracting Parties shall be at liberty to give notice to the other of its intention to put an end to it, and it shall altogether cease and determine at the expiration of six months from the date of such notice[54]."

It will be seen that the stipulations of both these Treaties apply to all persons indiscriminately, who may be charged with any of the enumerated crimes, without any regard to their Nationality. A Convention of Extra-Tradition, comprising a much greater number of crimes, but specially excepting native subjects or citizens of the party upon whom the requisition may be made, was signed at London (May 28, 1852) between France and Great Britain. It was provided by the Fifteenth Article, that the Convention should come into operation when an Act of Parliament should have passed to enable her Britannic Majesty to carry into execution the arrangements of the Convention; but the British Parliament declined to give the Executive Government the necessary Powers to execute its provisions. The Convention accordingly has remained inoperative. With regard to Treaties for the mutual surrender of criminals, there is a material difference in the power of the Executive Government, as exercised under the British Constitution, and under the American Constitution. An Act of Congress was passed on the 12th August, 1848, under which the Executive Govern-

[54] Hertslet, VI. p. 345. Martens, N. R. Gén. V. p. 20.

ment of the United States is empowered to give effect to Treaty-stipulations with Foreign Governments, which provide for the mutual surrender of criminals; whereas no analogous Powers have been granted by Parliament to the Executive Government of Great Britain, but a special Act of Parliament is required in each case to enable the British Government to give effect to a Treaty of Extra-Tradition. Such a Treaty, however, will have immediate effect in the Colonies of Great Britain.

Treaties of Boundary.

§ 225. Treaties of Boundary belong to a class of Treaties, which are regarded by Jurists as perpetual in their nature; so that, being once carried into effect, they subsist independently of any changes which may supervene in the political circumstances of either contracting party, unless they are mutually revoked. Vattel[55] speaks of Compacts which have no relation to the performance of reiterated acts, but merely relate to transient and single acts, which are concluded at once, and suggests that they may be more properly called by another name than that of Treaties. Martens[56] has accordingly proposed to call them *Transitory Conventions*, which Wheaton approves. "Les Traités de cession," says Martens, "des limites, d'échange, et ceux même qui constituent une servitude de Droit Public, ont la nature des Conventions transitoires; les Traités d'amitié, de commerce, de navigation, les alliances égales et inégales ont celle des Traités proprement dits (fœdera). Les Conventions Transitoires sont perpetuelles par la nature de la chose."

To the same effect Mr. Wheaton[57] says, "General Compacts between Nations may be divided into what

55 Droit des Gens, L. II. § 292.
56 Martens, Précis, § 58.
57 Wheaton's Elements, Part III. c. 2. § 9.

are called *Transitory Conventions*, and Treaties properly so called. The first are perpetual in their nature, so that, being carried into effect, they subsist independently of any change in the sovereignty and form of Government of the Contracting Parties: and although their operation may in some cases be suspended during war, they revive on the return of peace without any express stipulation. Such are Treaties of Cession, Boundary, or Exchange of Territory, or those which create a permanent Servitude in favour of one Nation within the Territory of another.

The principle involved in the doctrine of Jurists, that such Treaties are perpetual in their nature, may be thus stated. The International Acts, which have in view the settlement of a territorial boundary, are in substance Declarations or Recognitions of a Nation's title to a given territory, although they assume for the most part the form of Compacts. The form has come into use, partly because articles for the cession of territory or for the settlement of a territorial boundary between belligerents, are frequently comprised amongst the articles of a Treaty of Peace, partly because that form has been considered to confer upon the transaction a more binding character, than that which might be supposed to attach to a simple Declaration. But a Treaty of Boundary, as an Agreement or Convention, does not exercise any more permanently binding force upon the parties *vigore suo*, than any other Treaty. The more correct view would seem to be, that the arrangements under the Treaty derive their character of permanence not from the Treaty, but from the Common Law of Nations, inasmuch as when a Nation has once recognised another Nation to be in lawful Possession of a territory, the

Right of Possession of the latter is thereby established against the former Nation, whatever changes may subsequently arise in their mutual relations, as friends or foes. The Common Law of Nations maintains the latter Nation in its State of Possession, whenever such Possession has had a lawful origin, and the former Nation is by that Law for ever precluded from challenging the lawful origin of a State of Possession, which it has once solemnly recognised.

Judicial Decisions as to the Permanent Object of Certain Treaties.

§ 226. The Practice of Nations accords perfectly with the doctrine of Jurists in this matter. Thus a question was raised before an English Tribunal touching the interpretation of the Ninth Article of the Treaty of 1794[58], between Great Britain and the United States of America, which is as follows: "It is agreed that British Subjects, who now hold lands in the territories of the United States, and American Citizens, who now hold lands in the dominion of his Majesty, shall continue to hold them according to the nature and tenure of their respective states and title thereto, and may grant, sell, or devise the same to whom they please, in like manner as if they were Natives: and that neither they nor their heirs and assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as Aliens." The question raised in the Rolls Court[59] in this case in 1830 was, whether by the Article above recited American Citizens, who held lands in Great Britain on 28th day of October, 1795, are at all times to be considered, as far as regards those lands, not as Aliens, but as Native Subjects of the Crown of Great Britain."

The 28th Article of the Treaty had declared that

[58] Martens, Recueil, V. p. 662.

[59] Sutton v. Sutton, 1 Russell v. Mylne, p. 663.

the ten first Articles should be permanent, but the Counsel in support of the objection to the title contended that it was impossible to suggest that the Treaty was continuing in force in 1813, as it necessarily ceased with the commencement of the War; that the 37 G. III. c. 97. (which was passed to give effect to the Treaty) could not continue in operation a moment longer without violating the plainest words of the Act; that the word 'permanent' was used not as synonymous with 'perpetual or everlasting' but in opposition to a period of time expressly limited." On the other hand, the Counsel in support of the title maintained, that "the Treaty contained Articles of two different descriptions, some of them being temporary, others of perpetual obligation. Of those which were temporary, some were to last for a limited period, such as the various regulations concerning trade and navigation, and some were to continue so long as Peace subsisted, but, being inconsistent with a state of War, would necessarily expire with the commencement of hostilities. There were other stipulations which were to remain in force in all time to come, unaffected by the contingency of Peace or War. For instance, there were clauses for fixing the boundaries of the United States. Were the boundaries so fixed to cease to be the boundaries the moment that hostilities broke out?"

Sir John Leach, who at such time filled the office of Master of the Rolls, in pronouncing judgment said, "The privileges of Natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the Treaty, that the operation of the Treaty should be permanent and not depend upon the continuance of a state of Peace."

"The Act of 57 G. III. c. 95. gives full effect to this Article of the Treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this Article, that it was to be permanent and independent of a state of Peace or War, then the Act of Parliament must be held in the 24th Section, to declare this permanency, and when a subsequent Section provides that the Act is to continue in force, so long only as a state of Peace shall subsist, it cannot be construed to be directly repugnant and opposed to the 24th Section, but is to be understood as referring to such provisions of the Act only as would in their nature depend upon a state of Peace. The principle involved in the permanency of this Treaty would seem to be, that the Treaty was in substance a recognition of a title to lands on the part of the actual possessors of those lands and their heirs, and that it would be inconsistent with such a recognition for the possessors at any time to be regarded as Aliens in respect of those lands."

The American Tribunals have adopted a similar rule of interpretation. Thus Mr. Justice Washington, in delivering judgment in a case before the Supreme Court of the United States[60], said, "But we are not inclined to admit the doctrine urged at the Bar, that Treaties become extinguished *ipso facto* by war between the two Governments, unless they should be revived by an express or implied renewal on the return of Peace. Whatever may be the latitude of doctrine laid down by elementary writers on the Law of Nations dealing in general terms in relation to this subject, we are satisfied that the doctrine contended for is not universally true. There may be Treaties of

60 The Society for the Propagation of the Gospel in Foreign Parts, v. the Town of Newhaven. Wheaton's Reports, VIII. p. 494.

such a nature as to their subject and import, as that War will put an end to them, but where Treaties contemplate a permanent arrangement of Territorial and other National Rights, or which in their terms are meant to provide for the event of an intervening War, it would be against every principle of just interpretation to hold them extinguished by the event of War. If such were the Law, even the Treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

"We think, therefore, that Treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of War as well as of Peace, do not cease on the occurrence of War, but are at most only suspended while it lasts; and unless they are waived by the Parties, or new and repugnant stipulations are made, they revive in their operation at the return of Peace."

Treaties which create a Servitude of Public Law.

§ 227. Martens speaks of Treaties which create a Servitude of Public Law (une servitude du Droit Public) in favour of one Nation within the territory of another. The term *Servitude* is borrowed from the Civil Law of the Romans, where it is used to designate certain forms of *innocent use;* as for instance, a Right of Way across the land of a neighbour. A *Servitude* was distinguished by the Roman Jurists from a *Right,* and in order to convert a *Servitude* into a *Right,* some compact or stipulation to that effect was requisite. "Si quis velit vicino aliquod jus constituere, pactionibus atque stipulationibus id efficere

debet[61]." The Right of *innocent use* is only an Imperfect Right, but under certain circumstances a Right of Innocent Use may be likewise a Right of Necessity. Thus the Midchannel of a river may be the territorial boundary between two Nations, whilst neither Nation may be able to gain access by the River to its own ports owing to the set of the current or the force of the wind without passing over portions of the river which belong to the other Nation; or the territory of a Nation may be surrounded by the territory of another Nation, and the former may have no means of access to the open Sea without passing over the Territory of the latter Nation. Thus the Territory of the Swiss Confederation is enclosed on all sides by the Territory of other Nations, so that, until the Treaty of Vienna declared the navigation of the Rhine, amongst the other Great European Rivers, to be free to all Nations, the Swiss Confederation had not any access to the open Sea, except by passing over the territory of another Nation. Again, a Nation may have some portions of its territory separated from the rest of its territory by the territory of another Nation; thus the Rhenish Provinces of Prussia are separated by the territories of other German Powers from the North German and Polish Provinces of Prussia. Under circumstances of this nature a Treaty, which creates a Servitude, in other words, which establishes a Right of Way across the territory of one Nation in favour of another Nation, is held to create an obligation, which may be suspended indeed by the occurrence of War, but which revives on the return of Peace. Klüber has given to the expression *Servitude*[62] a much larger

[61] Justiniani Inst. L. II. Tit. II. De Servitutibus.

[62] Droit des Gens, § 137, 138.

interpretation, so much so, that if his use of the term be correct, it would seem doubtful whether it could be safely maintained, that all Conventions which create a Servitude of Public Law in favour of one Nation within the territory of another, are perpetual in their nature, and are not extinguished by the event of war. Mr. Wheaton[63] is careful in limiting his own position of law to treaties which create "*a permanent Servitude*," about which there can arise no dispute.

Treaties of Equal and Unequal Alliance.

§ 228. The class of International Compacts which have hitherto been under consideration are Compacts which constitute obligations between the Contracting Parties absolutely, as between themselves, and without any regard to third Parties. There is another large class which remains to be considered, under which Nations contract obligations towards one another in respect of third Parties, such as Treaties of Alliance, or of Protection, or of Guaranty, or of Subsidy. Treaties of Alliance are subdivided by Grotius into Equal and Unequal Treaties. A Treaty of Alliance upon equal conditions is made for the mutual security of the Contracting Parties, and it may be either limited to defensive purposes against a particular Enemy, in which case it was termed by the Greeks *ἐπιμαχία*, or it may extend to offensive as well as to defensive purposes, and it was then termed by them *συμμαχία*. An equal Treaty of Alliance does not necessarily contain identical conditions for each Party. Vattel draws a distinction between an Equal Treaty and an Equal Alliance. Equal Treaties, he says[64], are those in which the Contracting Parties promise the same things, or things that are equivalent, or finally things that are equitably proportioned, so that the

[63] Droit des Gens, L. II. § 172. [64] Elements, Part III. c. 11. § 9.

condition of the Parties is equal. Such is, for example, a defensive Alliance, in which the Parties reciprocally stipulate for the same succours. Such is an offensive Alliance, in which it is agreed that each of the Allies shall furnish the same number of vessels, or the same number of troops, of cavalry and of infantry, or an equivalent in vessels, in troops, in artillery or in money. Such is also a League in which the *Quota* of each of the Allies is regulated in proportion to the interest which he takes or may have in the design of the League. Thus the Emperor of the Germans and the King of England, in order to induce the States-General of the United Provinces to accede to the Treaty of Vienna (10 March, 1731), consented that the Republic should only promise to her Allies the assistance of four thousand foot and one thousand horse, though they engaged each to furnish it, in case it should be attacked, with eight thousand infantry and four thousand cavalry. Further, there may be included in this class Treaties, which stipulate that the Allies shall make common cause with one another, and act with all their forces; although their forces may be in fact unequal, they are willing in this instance to consider them as equal. *Equal Alliances* on the other hand, according to Vattel, are those in which an Equal treats with an Equal, no distinction of dignity being made between the contracting Parties, whilst *Unequal Alliances* are those which make a difference in the dignity of the Contracting Parties. It may well happen indeed that a Treaty of Equal Alliance is not at the same time an Equal Treaty; but it can rarely happen that a Treaty of Unequal Alliance is not at the same time an Unequal Treaty. Thus a powerful Monarch wishing to engage a weaker State in his interest, offers to it very advantageous conditions,

and promises gratuitous succours, or succours disproportionate to those for which he stipulates in return, whilst he claims at the same time a superiority of dignity, and exacts proportionate respect from his Ally. It is this last condition which renders the Alliance unequal; without such a condition the Treaty would have been unequal, but the Alliance would have been equal.

Unequal Alliances are subdivided into those which impair the Independence of one of the Contracting Parties, and those which do not impair it. The Independence of a Nation is impaired, when it gives up any of its Natural Rights, or consents to use them in absolute subordination to the will of another Nation. Thus a Nation may agree with another Nation not to make peace with a common Enemy or not to make war upon a third Party, and it does not thereby give up its Independence, but covenants to exercise a Right incident to its Independence under certain restrictions in favour of its Ally. But if a Nation agrees not to enter into a Treaty of any kind with any third Party without the consent of its Ally, the former contracts an Unequal Alliance *cum diminutione imperii*, for it deprives itself absolutely of a power, the possession of which is a condition *sine qua non* of National Independence.

Treaties of Protection.

§ 229. Treaties of Protection are Treaties in the nature of Unequal Alliance. They were in frequent use amongst the Greeks and Romans, and the expression *in fidem se tradere* is opposed by Latin authors to the phrase *in servitutem se tradere*. Thus Phæneas, the envoy of the Ætolians, announced to the Consul Atilius that the object of his Mission was to conclude a Treaty of Protection, and not a Treaty of Subjection to the Romans. "Non in servitutem, sed in

fidem tuam nos tradimus, et certum habeo te imprudentia labi, qui nobis imperes[65]." So the Numidians were considered to have placed themselves under Treaty in a relation to the Romans analogous to that in which Clients stood towards their Patrons. "Quorum in fide et in clientela Regnum (Numidia) erat[66]." "As Private Protection," says Grotius[67], "took not away Personal liberty, so Public Protection does not take away Civil liberty, which cannot be conceived without Sovereignty." That the maintenance of National Independence on both sides is not inconsistent with a Treaty of Protection between two States is established by the practice of Nations in modern times. Thus the City of Danzic, with a territorial radius of two leagues, was placed by the Treaty of Tilsit[68], under the Protection of the Kings of Prussia and Saxony, without prejudice to its Independence; so the free City of Cracow was declared by the Final Act of the Congress of Vienna, to be a Free Independent and strictly Neutral City under the protection of Prussia, Austria, and Russia. The form, under which Treaties of Protection may be concluded, varies indefinitely. Modern Treaties of Protection, for the most part, provide that the Protecting Power shall keep garrison within the Protected State, and this may be considered as the characteristic feature of a Treaty of Protection as distinguished from a Treaty of Unequal Alliance. Thus by the Treaty of Turin (Nov. 7, 1817)[69], concluded between the King of Sardinia and the Prince of Monaco, it is stipulated that the King of Sardinia shall always maintain a garrison

65 Titi Livii Hist. L. XXXVI. c. 28.

66 Julii Flori, L. III. c. 1. n. 3.

67 De Jure B. et P. L. I. c. 3. § 21.

68 Treaty between France and Russia, 7 July, 1807. Martens, Recueil, VIII. p. 639.

69 Martens, Nouveau Supplement, II. p. 243.

of five hundred men at his own expense in Monaco. The King of Sardinia also undertakes to defend the Prince of Monaco against foreign enemies, to include his name in Treaties of Peace with Foreign Powers, and to allow him to use the Royal Standard of Sardinia in time of War.

Treaties of Subsidy.

§ 230. Treaties of Subsidy are Treaties under which a Power, which does not take part in a war as a Principal, furnishes a limited succour to another power, as an Auxiliary. Treaties of General Alliance are to be distinguished from Treaties of Subsidy. When one State stipulates to furnish to another a limited succour of troops in return for an annual payment of money, without any provision in contemplation of an eventual engagement in general hostilities, such a Treaty does not render the State which furnishes such limited succour, an associate in any war that the other State may undertake. The payment, which the Power, who receives such limited succour, makes in return, is called a *Subsidy*, and it was at one time the practice both of France and Great Britain to have recourse to Treaties of Subsidy with certain German Powers in order to procure troops to carry on their wars. Of this kind was the treaty of Subsidy concluded between the King of Great Britain and the Landgrave of Hesse-Darmstadt (5th Oct. 1793)[70], under which the latter Power undertook to furnish to the former for three years a corps of 3000 troops of all arms for service in any part of Europe, in consideration of an annual Subsidy. Under the head of Treaties of Subsidy may be classed the Conventions, which formerly existed between the Helvetic Cantons and various European Powers, under which the former furnished Swiss Regiments for the service of the

[70] Martens, Recueil, V. p. 524.

latter Powers. These Conventions are sometimes called Military Capitulations, and such is the name given to a Convention which Spain concluded at Berne (2 Aug. 1804)[71] with the Helvetic Confederation for the continuous services of five Regiments during the space of thirty years. There is another use of the phrase 'Treaty of Subsidy' which must not be overlooked. A Treaty of Subsidy is virtually a Treaty of Alliance, when one Power enters into an agreement with another Power, that the latter shall furnish troops to fight against a Third Power, on condition of the former finding money for the maintenance of them. A Treaty of Subsidy for such an object is sometimes incorporated with a Treaty of Alliance. Thus we have a Convention of Alliance and Subsidy concluded at Reichenbach (15th June, 1813)[72], between Great Britain, Russia, and Prussia, under which the former Power engaged herself to furnish 1,133,334 pounds sterling, before the expiration of twelve months, and to maintain the Russian fleet, which was at such time in the Ports of Great Britain, at an estimated expenditure of 550,000 pounds sterling. A Subsidy is sometimes an alternative provision in a Treaty of Alliance. Thus under the Treaty of Alliance concluded at Berlin[73] (15 April, 1788), between the States-General of the United Provinces and Prussia, the former Power had the alternative of furnishing money, if it could not furnish troops. A separate Convention of Subsidy is sometimes agreed to as supplemental to a Military Convention; this practice is generally observed when all the parties to the Military Convention are not at the same time parties to the Convention of Subsidy.

[71] Martens, Recueil, VIII. p. 228. [72] Martens, N. R. I. p. 568.
[73] Martens, Recueil, IV. p. 379.

Thus after a Military Convention had been concluded between Sardinia, Great Britain, and France at Turin (26 Jan. 1855), a supplemental Treaty of Subsidy was concluded between Sardinia and Great Britain[74], under which the Queen of Great Britain undertook to recommend to her Parliament to advance by way of loan to the King of Sardinia the sum of one million pounds sterling. The King of Sardinia had agreed, under the previous Military Convention, to furnish for the service of the war against Russia a corps of 15,000 men; and France and Great Britain had in return guaranteed the integrity of the dominions of the King of Sardinia, and engaged themselves to defend them against every attack pending the war.

Treaties of Guaranty.

§ 231. Treaties of Guaranty are Compacts under which a State promises to aid another State, if it should be disturbed in the enjoyment of a Conventional Right as distinguished from a Natural Right. When a Treaty of Peace is concluded, which proceeds upon a settlement of territorial boundary, it is not unfrequent to invoke the Guaranty of one or more powerful States to maintain the weaker of the two contracting Parties in the State of Possession established by the Treaty. "When those," says Vattel, "who make a Treaty of Peace or any other Treaty are not perfectly easy with respect to its observance, they require the Guaranty of a powerful Sovereign. The Guarantee promises to maintain the conditions of the Treaty and to cause it to be observed. As he may find himself obliged to make use of force against the party who attempts to violate his promises, it is an engagement that no Sovereign ought to enter into lightly and without good reason. Princes indeed seldom enter into it, unless when they have an in-

74 Martens, N. R. Gén. XV. p. 613.

direct interest in the observance of the Treaty, or are induced by particular relations of friendship. The Guaranty may be promised equally to all the contracting parties, to some of them, or even to one of them alone, but it is commonly promised to all in general. It may also happen when several Sovereigns enter into a common alliance that they all reciprocally pledge themselves to each other, as Guarantees for its observance. The Guaranty is a kind of Treaty by which assistance and succour are promised to any one, in case he has need of them, in order to compel a faithless Ally to fulful his engagements[75]."

"The term Guaranty," continues the same writer, "is often taken in a sense somewhat different from that we have given to it. For instance, most of the Powers of Europe guarantied the Act, by which Charles VI had regulated the Succession to his dominions, and Sovereigns sometimes reciprocally guaranty their respective States. But we should rather denominate those transactions Treaties of Alliance for the purpose, in the former case, of maintaining the Rule of Succession under the Pragmatic Sanction; and in the latter, of supporting the State of Possession of a Friendly Power[76]."

To the same effect Klüber[77] writes, "L'une des plus usitées des Conventions dont nous nous occupons, est la Garantie proprement dite, par laquelle un Etat promet de prêter secours à un autre Etat, dans le cas que celui-ci serait lésé ou menacé d'un préjudice dans exercice de certains Droits par le fait d'une tierce puissance. La Garantie est toujours promise par rapport à une tierce puissance, de la part de laquelle il pourrait être porté préjudice à des droits

75 Droit des Gens, L. II. c. 15. § 235.
76 Ibid. § 228. 77 Ibid. § 157–159.

acquis.". " Lorsque la Garantie est destinée à assurer l'inviolabilité d'un Traité, elle forme toujours une obligation et un Traité accessoire (pactum accessorium), même quand elle ferait partie de l'acte de la Convention principale."... § 159. " Les Garanties sont générales ou spéciales, selon que tous les droits d'une espèce déterminée, ou toutes les possessions d'un Etat, ou toutes les stipulations contenues dans un Traité, ou bien une partie seulement de ces droits, possessions, ou stipulations, sont garantis. Tantôt elles sont stipulées pour toujours, tantôt pour un temps déterminé. Dans le cas d'une lésion relative à l'objet garanti, ne fut elle même qu'imminente encore, le Garant, sur l'invitation que doit lui en être faite, est tenu de prêter le secours promis, à mesure cependant que le provoquant en garantie aurait lui-même le droit de défense, ou de se faire raison à soi-même, et toujours sans porter préjudice aux droits d'un tiers (salvo jure tertii). Le garant n'a ni droit ni obligation de faire davantage que de prêter l'assistance promise."

An International Guaranty is thus strictly concerned with *International Rights*, even where the subject of the Guaranty may be a Rule of Succession, as in the case of the Pragmatic Sanction of Charles VI, or the undisturbed possession of Territory as in the case of the Germanic Confederation, equally as when it is given by a third party to a Treaty of Peace, such as the Guaranty of his Britanic Majesty to the Treaty of Peace made at Utrecht in 1715 between the Crowns of Spain and Portugal. For instance, when Foreign Powers were invited to guaranty the Pragmatic Sanction, it was not intended that such Guaranty should affect the Political Independence of the Austrian Crown, so as to limit in

any way its right to rescind or modify the Rule of Succession; but that the Guarantying Powers should support the daughter of Charles VI against any Foreign Power, which should attempt in its character of a Foreign Power to disturb her in the peaceable enjoyment of the Rights secured to her by the Pragmatic Sanction.

No rule of International Law is more clear than that a Convention of Guaranty *nude and absolute* does not apply to the case of Political changes. If, for instance, Denmark had guaranteed to the Princess Anne of England the undisturbed possession of the British throne upon the death of William III, *contra quoscunque*, no *casus fœderis* would have arisen if the Highlanders of Scotland had attempted to restore the Crown to the son of James II; but if Louis XIV or Philip V, as Foreign Powers, had sent an army to cooperate with the insurgents in depriving the Princess Anne of the Succession, there would have been at once an undeniable *Casus Fœderis*. Even an expression so indefinite as *contra quoscunque* is limited by the nature of the subject matter; it may apply to the slightest International interference, from whatever quarter it may be threatened, but even a Civil War will not extend its operation to Political troubles.

Such an expression is found in the eleventh article of the Treaty of Gottorp of 26th June, 1715, concluded between the King of Great Britain, as Duke of Brunswick, Luneburg (Elector of Hanover), and King Frederick IV of Denmark, by which "his Royal Majesty in Great Britain engages and obliges himself, for his heirs and successors, to maintain King Frederick IV, his heirs and successors, in the occupation, enjoyment, and possession of the Ducal part of the

Duchy of Schleswig *contra quoscunque* in the most effective manner, and to guaranty assistance; and to that end on every occasion when need shall require it, and it shall be demanded of His Royal Majesty in Great Britain on the part of the King of Denmark, within six weeks *a die requisitionis* to furnish without fail the assistance determined in the next preceding article, and otherwise, according to the exigency of circumstances, to assist with all his might and all his power."

In consideration of this Guaranty Denmark gave up to the Elector of Hanover the Duchies of Bremen and Verden which she had conquered from Sweden in 1712, and which Hanover has retained down to the present day; and Hanover on her part united her forces with those of Denmark, and thereby contributed to bring about the Treaty of Stockholm, of June 3, 1720, and which Denmark would not consent to ratify, until she had obtained the separate acts of Guaranty on the part of the Kings of Great Britain and France on the 26th July and 8th August of the same year[78].

A Guaranty being given in favour of one of the Contracting Parties to a Territorial settlement, does not authorise the Guarantying Power to interfere in the enforcement of the settlement, unless his interference should be invoked. If the Contracting Parties choose to vary the settlement, they have a right to do so, and the Guarantying Power cannot oppose it; the obligation upon the latter to support the Party who should complain of the infringement of the settlement, does not carry with it a right to interfere without invitation; for the Guaranty was not

[87] Twiss on the Relations of the Duchies of Schleswig and Holstein to the Crown of Denmark and the Germanic Confederation, p. 124.

given for the advantage of the Guarantying Power, otherwise it would have been a Principal in the Contract. Vattel[79] observes, that it is of great importance to keep in mind the distinction in this respect, between a Treaty of Guaranty and a Treaty of Alliance, lest under colour of a Guaranty, a powerful Nation should claim to be arbiter of the affairs of its neighbours, and pretend to give law to them.

Dr. Phillimore[80] seems to doubt the soundness of the position, that a *Convention of Guaranty* does not apply to Political changes, and lays stress upon a passage in Vattel[81], in which that writer says, "An Ally ought doubtless to be defended against every invasion, against every foreign violence, and even against his rebellious Subjects." It may however well happen that Sovereign Princes are at liberty to enter into Treaties of Alliance for mutual assistance against their own Subjects, if they should revolt; as, for instance, the Sovereign Princes and Free Cities of Germany have entered into a League[82], under which they have bound themselves to intervene, if the Subjects of any Confederate State should revolt, and yet it may consist with Reason, that a Convention of nude and absolute Guaranty, *contra quoscunque*, will not extend to Political Troubles. Again, the second Treaty of Barrier[83], (30 Jan. 1713,) under which the Dutch engaged themselves to give aid to Queen Anne and her Successors to the British Crown, being Protestants, according to the order of Succession as established by the Parliament of England, against all

79 Droit des Gens, L. II. c. 16. § 286.

80 Commentaries on International Law, T. II. pp. 72, 75.

81 Vattel, L. II. c. 12. § 197.

82 Final Art. of the Germanic Confederation. Art. XXV, and XXVI. Martens, N.R. V. p. 489.

83 Schmauss, Corpus Jur. p. 1287. Dr. Phillimore refers to this Treaty, which Lord Liverpool terms a Defensive Alliance.

such States and Persons as should attempt by *open war*, or by *secret conspiracy*, or by *treason* to set aside the Succession so established, is relieved of all ambiguity by its very speciality; for it is not a Treaty of nude and absolute Guaranty, *contra quoscunque*, but a specific Treaty of Aid and Succour, (ipsi Reginæ opitulaturos ad pugnandum pro jure Successionis ad Coronam,) promised to the Queen herself, and after her death to her lawful heirs, under circumstances specified either of Foreign war, or of Civil tumult.

The Treaty concluded in London[84] on the 7th May, 1832, between France, Great Britain, and Russia on one part, and Bavaria on the other part, provides that Greece, under the Sovereignty of Prince Otho, and under the *Guaranty* of the three Courts, should form a Monarchical and Independent State. It is obvious, that such a Guaranty cannot be construed as a Guaranty to King Otho against a Rebellion of his Subjects, but only as a Guaranty of the Independence of his Throne; which is a matter strictly within the province of an International Guaranty.

Treaties of Neutrality.

§ 232. Treaties of Neutrality are Treaties under which either the absolute Neutrality of a Nation is agreed upon, or particular acts of Neutrality on its part are covenanted for. The Swiss Confederation, and the Kingdom of Belgium are States, of which the absolute Neutrality is made a matter of Treaty-stipulation between all the Great Powers of Europe. Accordingly, no State is entitled to demand of either of these States under the General Law of Nations, that it should allow a free passage to its troops for belligerent purposes through its Territory. In the case of Nations which have agreed to observe par-

[84] Martens, N. Recueil, X. p. 550.

ticular acts of Neutrality, such obligations have reference for the most part to Rights under the General Law of Nations, which a Neutral Power has an option to enforce or not, as it shall think fit. Such, for instance, were the provisions of the Treaty[85] of Amity, Commerce, and Navigation, concluded between Great Britain and the United States of America, 19 Nov. 1794, but not ratified by the latter Power until 28th Oct. 1795. By the Twenty-fifth Article of this Treaty it was provided, "that neither of the said Parties shall permit the ships or goods belonging to the subjects or citizens of the other, to be taken within cannon shot of the Coast, nor in any of the Bays, Ports, or Rivers of their Territory by ships of war, or others having commission from any Prince, Republic, or State whatever. But in case it should so happen, the Party, whose Territorial Rights shall thus have been violated, shall use its utmost endeavours to obtain from the offending Party, full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war, or merchant vessels."

There have been Treaties of Armed Neutrality between Neutral States, pending war between belligerent Powers, the object of which has been to give mutual aid to each other in maintaining the Rights of Neutrals under the General Law of Nations. These and other matters touching Neutrality will be more fully discussed in their appropriate place in a future Chapter, in connection with the Rights of Nations in time of War.

Conclusion and Ratification of Treaties.

§ 233. There are certain International Compacts or Conventions which are distinguishable from Treaties (Fœdera) properly so called; being concluded not in virtue of an express delegation of Full Powers from a

[85] Martens, Recueil, V. p. 68.

Nation to that purpose, but in virtue of an implied delegation of Full Powers, as incidental to an Official Station. Thus the Commander of an army has an implied delegation of Full Powers to suspend or limit the operation of hostilities, by means of Truces for the suspension of arms, Cartels for the exchange of prisoners, and Capitulations for the surrender of troops or fortresses. Conventions for such purposes do not require any Ratification on the part of the Supreme Power of the State. It is otherwise, however, with regard to a definitive Treaty of Peace. A definitive Treaty of Peace, according to the usage of Nations, requires Ratification, and although every Treaty is operative from the date of its signature, unless it contains an express provision to the contrary, yet its operation is suspended until the exchange of Ratifications shall have taken place, whereupon the Treaty acquires validity from the date of its signature. There is, however, an exception to the rule of a Treaty taking effect from the date of its signature in regard to treaties stipulating for the Cession of Territory. In the case of such Treaties they only take full effect upon the actual Cession (traditio) of the Territory itself. Thus the National Character of a Territory for commercial purposes continues unaltered, notwithstanding it may have been ceded by Treaty, as long as it continues in the actual possession of the State which has agreed to cede it[86]. Upon the actual change of the State of Possession, the National Character of the inhabitants undergoes a corresponding change. It may happen after a Treaty has been signed by the Plenipotentiary of a Nation, that grave circumstances occur, under which the provisions of the Treaty may be likely to have a prejudicial effect

[86] The Fama, 5 Robinson, p. 106.

upon the interests of that Nation, which were not known at the time of signature. Under such circumstances the Sovereign Power of a Nation is by Usage justified in declining to ratify the Treaty. Thus the King of the Netherlands refused in 1841 to ratify a Treaty for the incorporation of Luxembourg into the Customs' Union of the Germanic States on the ground of the injurious effects which it was likely to exercise upon the commercial interests of his subjects, which had been brought to his knowledge subsequently to the signature of the Treaty. So the King of the French declined in 1841 to ratify the Quadruple Treaty for the suppression of the Slave Trade on account of the objections raised against it in the French Chambers. So Great Britain declined in 1859 to ratify a Treaty which her Minister Plenipotentiary had concluded with Nicaragua, and Nicaragua in the same year declined to ratify her Convention with Great Britain for the settlement of the Grey Town and Mosquito Question. If, however, there should be an express provision that the preliminary engagements shall take effect immediately without waiting for the exchange of Ratifications, such a Treaty will be an exception to the rule. We have an instance of such a Treaty in the Convention concluded at London[79] (15 July, 1840) for the pacification of the Levant between Great Britain, Austria, Prussia, and Russia, on the one part, and the Ottoman Porte on the other, to which there was annexed a Reserved Protocol of the same date, providing that the preliminary measures, mentioned in the Second Article of the Convention, should be put into execution immediately (tout de suite) and without waiting for the exchange of Ratifications.

79 Martens, N. R. Gén. I. p. 156.

§ 234. Treaties properly so called, the engagements of which imply a state of Amity between the Contracting Parties, cease to operate if War supervenes, unless there are express stipulations to the contrary. It is usual on the signature of a Treaty of Peace for Nations to renew expressly their previous Treaties, if they intend that any of them should become once more operative. Great Britain in practice admits of no exception to the rule that all Treaties, as such, are put an end to by a subsequent war between the Contracting Parties[80]. It was accordingly the practice of the European Powers before the French Revolution of 1789, on the conclusion of every war which supervened upon the Treaty of Utrecht, to renew and confirm that Treaty, under which the distribution of Territory amongst the principal European States had been settled with the view of securing an European Equilibrium. Termination and Renewal.

In the Treaty of Paris (30 March, 1856) there occurs a provision which is equivalent in its effect to the renewal of previous Treaties, under which it has been agreed that until the Treaties or Conventions which existed before the war between the Belligerent Powers shall have been renewed or replaced by new arrangements, the commercial intercourse between the subjects of the various Powers shall be reciprocally maintained on the same footing as before the war, and their subjects in all other matters shall be respectively treated upon the footing of the most favoured Nation[81]. In the Treaty of Zurich, concluded between France, Austria, and Sardinia[82] (10 Nov. 1859), all the Treaties and Con-

[80] Lord Bathurst's Letter of Oct. 30, 1815. Twiss' Oregon Question, p. 188.

[81] Art. XXXI. Martens, N. R. Gén. XV. p. 780.

[82] Ibid. XVI. Part II. p. 536.

ventions concluded between Austria and Sardinia, which were in force before April 1, 1859 are confirmed, so far as the Treaty itself does not derogate from them, but the Two Powers undertake to submit in the course of a year those Treaties and Conventions to a General Revision, in order to introduce, by common accord, the modifications which may be thought conformable to the interests of both countries. There is, however, no corresponding provision either in this Treaty, or in the separate Treaty of Peace of the same date and place concluded between France and Austria, whereby the Treaties and Conventions between those Two Powers, if any such were in force before April 1st, 1859[83], are confirmed.

[83] Recueil des Traités et Conventions conclus par l'Autriche avec les Puissances Etrangères, depuis 1763 jusqu'à nos jours, par Léopold Neumann, Leipzig, 1855–59. This collection of Treaties contains special Treaties of Commerce and Navigation, of Extra-Tradition, and of Postal Service, concluded between France and Austria, determinable every Five Years at the pleasure of either Party.

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